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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission Record

Volume 3
Issue 22

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iv

Table of Docket Numbers..... vi

Table of Rulemaking Numbers..... vii

Table of Localities.....viii

Table by Subject Matter..... ix

Table by Statutory and Rule Provisions.....xiii

Decisions, Reports, Memorandum Opinions, Orders, and
Other Selected Material.....6204

Federal Communications Commission Record

Table of Cases
Volume 3
Issue 22

Case Name	Page
ANR Pipeline Company v. AT & T Company	6467
AT&T Communications	6409
Abilene Radio Partnership	6417
Access Tariff Filing Schedules (ERRATUM)	6301
Amendment of Parts 13 and 80 - Ship Radio Officer	6361
Amendment of Part 22 - Public Mobile Service Applicants	6306
American Teltronix	6305
Bell Atlantic's Interconnection Plan	6247
BellSouth's Petition for waiver of CEI Requirements	6414
Brehm, Joanne	6386
Cable Television Cross-Ownership Rules	6303
Cellular Telephone Company	6274
Centel Telephone Companies	6360
Certain Telephone Companies file revisions to Cost Manuals	6258
Cincinnati Bell	6260
Class A and Tier 1 Telephone Companies	6375
Class II-S and III-S AM Radio Broadcast Stations	6444
Communications Satellite Corporation	6469
Computation of Time (ERRATUM)	6276
Contel Corporation Telephone Operating Companies	6259
County of San Diego	6257
Depreciation Rates and Amortizations for AT&T Company	6389
Elimination of FCC Form 901	6261
Erath Broadcasting, A Partnership	6298
Fisher Broadcasting, Inc.	6279
Forney, Doylan	6330
Fulani, Lenora B.	6245
Gilbert, Mary Faye	6339
HRTC Joint Venture	6369
Hazard Broadcasting Services	6296
IDB Communications Group, Inc.	6367
Illini Broadcasting, Inc.	6295
Image Broadcasting, Inc.	6234
Improved Calculation AM Nightline Protector	6448
Jam Communications, Inc.	6285
Juniata College	6293
Kaw Valley Broadcasting Co. (ERRATUM)	6219
Kennebunkport FM Limited Partnership	6415
Lehigh Valley Telcom, Inc. v. Bell Telephone Company of Penn.	6413
Lorimar Telepictures Corporation	6250
MTS and WATS Market Structure	6465
Maritime Services Rules (Part 80)	6239

Case Name	Page
Mobile Radio Telephone & Paging Service, Inc.	6230
NYNEX	6468
O'Neal, Dennis N.	6238
Pocahontas Broadcasting Company	6421
RA-AD of Trenton, Inc.	6237
RKO General, Inc. (KHJ-TV)	6242
Radio Reading Services	6323
Religious Broadcasting Network	6216
Resale Policy	6302
Rollings Communications, Inc.	6419
Rural Cellular Service	6401
School District No. 1 - State of Colorado	6392
Schumacher, Paul and Nancy	6277
Silver Star Communications-Albany, Inc.	6342
Skywave Propagation in the AM Broadcast Service	6431
State Line Broadcasting	6232
Table of Allotments, FM, Augusta, AR	6322
Table of Allotments, FM, Beaumont and Big Bear Lake, CA	6458
Table of Allotments, FM, Bonita Springs and Cape Coral, FL	6314
Table of Allotments, FM, Bowling Green, VA	6220
Table of Allotments, FM, Bridgeport, NY	6282
Table of Allotments, FM, Carthage, IL	6454
Table of Allotments, FM, Centerville, UT	6320
Table of Allotments, FM, Clearwater, FL	6210
Table of Allotments, FM, Deer Park, WA	6321
Table of Allotments, FM, Dickson, TN	6428
Table of Allotments, FM, Fitzgerald, GA	6224
Table of Allotments, FM, Five Points, FL	6316
Table of Allotments, FM, Folsom and Bogalusa, LA	6462
Table of Allotments, FM, Fort Myers Villas, FL	6312
Table of Allotments, FM, Georgetown, Marlin and San Saba, TX	6228
Table of Allotments, FM, Gleneden Beach, OR	6464
Table of Allotments, FM, Grifton, NC	6284
Table of Allotments, FM, Hilo, HI	6427
Table of Allotments, FM, Huntsville and Centerville, TX	6429
Table of Allotments, FM, Kailua-Kona, HI	6426
Table of Allotments, FM, Kelso, WA	6311
Table of Allotments, FM, Key West, FL	6423
Table of Allotments, FM, LaGrande, OR	6283
Table of Allotments, FM, Lebanon, TN	6318
Table of Allotments, FM, Lobelville, TN	6319
Table of Allotments, FM, Lumpkin, GA	6206
Table of Allotments, FM, Martin, SD	6226
Table of Allotments, FM, McArthur, OH	6281
Table of Allotments, FM, North Windham, ME	6461
Table of Allotments, FM, Okmulgee and Stillwater, OK	6425
Table of Allotments, FM, Old Forge, NY	6317

Case Name	Page
Table of Allotments, FM, Ossian, IA	6222
Table of Allotments, FM, Sheridan, AR	6455
Table of Allotments, FM, South Webster, OH	6208
Table of Allotments, FM, Wahpeton, ND	6204
Table of Allotments, FM, Winnebago, NE	6212
Table of Allotments, FM, Yreka City, CA	6456
Table of Allotments, FM, Woodstock and Broadway, VA	6398
Tel-Rad Message Center, Inc.	6300
Tribune Broadcasting Company	6248
Western Telecommunications, Inc.	6405
Zawila, William L.	6214

Table of Cases by Delegated Authority and FCC Number
Volume 3
Issue 22

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 88 -1479	6311	DA 88 -1666	6279
DA 88 -1547	6389	DA 88 -1667	6303
DA 88 -1573	6415	DA 88 -1668	6300
DA 88 -1574	6293	DA 88 -1675	6301
DA 88 -1578	6302	DA 88 -1676	6305
DA 88 -1580	6232	DA 88 -1677	6421
DA 88 -1581	6295	DA 88 -1679	6312
DA 88 -1582	6234	DA 88 -1680	6314
DA 88 -1583	6296	DA 88 -1681	6316
DA 88 -1585	6417	DA 88 -1682	6318
DA 88 -1586	6298	DA 88 -1683	6319
DA 88 -1590	6367	DA 88 -1684	6320
DA 88 -1612	6360	DA 88 -1685	6321
DA 88 -1625	6276	DA 88 -1686	6322
DA 88 -1636	6247	DA 88 -1687	6465
DA 88 -1638	6219	DA 88 -1688	6317
DA 88 -1639	6419	DA 88 -1689	6369
DA 88 -1640	6204	DA 88 -1690	6414
DA 88 -1641	6206	DA 88 -1691	6454
DA 88 -1642	6208	DA 88 -1692	6455
DA 88 -1643	6210	DA 88 -1693	6456
DA 88 -1644	6212	DA 88 -1694	6458
DA 88 -1645	6220	DA 88 -1695	6461
DA 88 -1646	6222	DA 88 -1696	6423
DA 88 -1647	6224	DA 88 -1698	6425
DA 88 -1648	6226	DA 88 -1699	6426
DA 88 -1649	6228	DA 88 -1700	6427
DA 88 -1650	6277	DA 88 -1701	6428
DA 88 -1652	6281	DA 88 -1702	6462
DA 88 -1653	6464	DA 88 -1704	6429
DA 88 -1654	6282	DA 88 -1705	6413
DA 88 -1655	6283	DA 88 -1707	6409
DA 88 -1656	6284	DA 88 -1710	6467
DA 88 -1657	6230	DA 88 -1715	6469
DA 88 -1658	6248	DA 88 -1716	6468
DA 88 -1660	6237	FCC 88 - 261	6398
DA 88 -1661	6238	FCC 88 - 304	6306
DA 88 -1662	6257	FCC 88 - 308	6274
DA 88 -1663	6258	FCC 88 - 310	6261
DA 88 -1664	6259	FCC 88 - 311	6375
DA 88 -1665	6260	FCC 88 - 316	6386

Delegated Authority or FCC Number	Page
FCC 88 - 319	6239
FCC 88 - 320	6401
FCC 88 - 323	6323
FCC 88 - 324	6431
FCC 88 - 325	6444
FCC 88 - 327	6448
FCC 88 - 329	6250
FCC 88 - 332	6392
FCC 88 - 334	6361
FCC 88 - 337	6405
FCC 88 - 346	6242
FCC 88 - 353	6245
FCC 88D - 34	6285
FCC 88R - 56	6330
FCC 88R - 57	6214
FCC 88R - 58	6216
FCC 88R - 59	6339
FCC 88R - 60	6342

Table of Cases by Docket Number
Volume 3
Issue 22

Docket Number				Page
CC	Dkt.No.78	-	72	6465
CC	Dkt.No.80	-	286	6465
CC	Dkt.No.85	-	388	6401
CC	Dkt.No.86	-	182	6375
CC	Dkt.No.86	-	297	6465
CC	Dkt.No.87	-	266	6303
CC	Dkt.No.87	-	503	6261
CC	Dkt.No.87	-	611	6409
CC	Dkt.No.88	-	326	6301
CC	Dkt.No.88	-	475	6306
GEN	Dkt.No.85	-	141	6276
GEN	Dkt.No.88	-	37	6361
MM	Dkt.No.83	-	911	6216
MM	Dkt.No.85	-	182	6330
MM	Dkt.No.86	-	155	6342
MM	Dkt.No.86	-	381	6462
MM	Dkt.No.87	-	9	6323
MM	Dkt.No.87	-	173	6285
MM	Dkt.No.87	-	176	6316
MM	Dkt.No.87	-	336	6461
MM	Dkt.No.87	-	401	6428
MM	Dkt.No.87	-	454	6464
MM	Dkt.No.87	-	547	6311
MM	Dkt.No.87	-	564	6322
MM	Dkt.No.87	-	594	6429
MM	Dkt.No.87	-	620	6321
MM	Dkt.No.88	-	2	6339
MM	Dkt.No.88	-	22	6319
MM	Dkt.No.88	-	39	6425
MM	Dkt.No.88	-	41	6281
MM	Dkt.No.88	-	43	6283
MM	Dkt.No.88	-	74	6455
MM	Dkt.No.88	-	77	6423
MM	Dkt.No.88	-	80	6312
MM	Dkt.No.88	-	92	6214
MM	Dkt.No.88	-	125	6426
MM	Dkt.No.88	-	127	6318
MM	Dkt.No.88	-	129	6282
MM	Dkt.No.88	-	130	6317
MM	Dkt.No.88	-	154	6284
MM	Dkt.No.88	-	187	6320
MM	Dkt.No.88	-	220	6427
MM	Dkt.No.88	-	232	6228
MM	Dkt.No.88	-	236	6454
MM	Dkt.No.88	-	427	6219
MM	Dkt.No.88	-	477	6234
MM	Dkt.No.88	-	478	6238
MM	Dkt.No.88	-	479	6237
MM	Dkt.No.88	-	480	6232
MM	Dkt.No.88	-	481	6296
MM	Dkt.No.88	-	482	6295
MM	Dkt.No.88	-	483	6415
MM	Dkt.No.88	-	484	6298
MM	Dkt.No.88	-	485	6417
MM	Dkt.No.88	-	486	6293
MM	Dkt.No.88	-	498	6204
MM	Dkt.No.88	-	499	6206
MM	Dkt.No.88	-	500	6208
MM	Dkt.No.88	-	501	6210
MM	Dkt.No.88	-	502	6212
MM	Dkt.No.88	-	503	6220
MM	Dkt.No.88	-	504	6222
MM	Dkt.No.88	-	505	6224
MM	Dkt.No.88	-	506	6226
MM	Dkt.No.88	-	508	6431
MM	Dkt.No.88	-	509	6444
MM	Dkt.No.88	-	511	6448
MM	Dkt.No.88	-	512	6314
MM	Dkt.No.88	-	516	6419
MM	Dkt.No.88	-	517	6421
MM	Dkt.No.88	-	518	6456
MM	Dkt.No.88	-	519	6458
PR	Dkt.No.88	-	507	6239

Table of Cases by Rulemaking Number
Volume 3
Issue 22

Rulemaking Number	Page
RM - 5352	6462
RM - 5534	6316
RM - 5554	6306
RM - 5625	6312
RM - 5663	6462
RM - 5672	6461
RM - 5725	6454
RM - 5824	6318
RM - 5846	6322
RM - 5876	6428
RM - 5900	6423
RM - 6026	6464
RM - 6063	6455
RM - 6093	6311
RM - 6098	6321
RM - 6100	6429
RM - 6114	6319
RM - 6119	6283
RM - 6123	6456
RM - 6140	6426
RM - 6144	6281
RM - 6151	6425
RM - 6195	6317
RM - 6199	6282
RM - 6200	6284
RM - 6215	6320
RM - 6220	6427
RM - 6310	6228
RM - 6379	6458
RM - 6418	6314
RM - 6422	6220
RM - 6424	6429
RM - 6435	6206
RM - 6436	6208
RM - 6444	6222
RM - 6446	6226
RM - 6447	6224
RM - 6449	6212
RM - 6450	6210
RM - 6486	6204
RM - 6507	6314

Table of Cases by City
Volume 3
Issue 22

City/State	Page	City/State	Page
Abilene, TX	6417	Kennebunkport, ME	6415
Apalachicola, FL	6386	Key West, FL	6423
Augusta, AR	6322	La Grande, OR	6283
Beaumont, CA	6458	Laurel, DE	6238
Belle Chasse, LA	6339	Lebanon, TN	6318
Big Bear Lake, CA	6458	Lobelville, TN	6319
Bogalusa, LA	6462	Los Angeles, CA	6242
Bonita Springs, FL	6314	Lowell, AR	6234
Bowling Green, VA	6220	Lumpkin, GA	6206
Bridgeport, NY	6282	Marlin, TX	6228
Broadway, VA	6398	Martin, SD	6226
Cape Coral, FL	6314	McArthur, OH	6281
Cape May, NJ	6277	Newburgh, NY	6300
Carthage, IL	6454	North Fort Riley, KS	6219
Centerville, UT	6320	North Windham, ME	6461
Centerville, TX	6429	Okmulgee, OK	6425
Clearwater, FL	6210	Old Forge, NY	6317
Cordele, GA	6342	Ossian, IA	6222
Culver City, CA	6367	Pittsburgh, PA	6250
Deer Park, WA	6321	Portland, OR	6279
Denver, CO	6392	San Bernardino, CA	6216
Dickson, TN	6428	San Diego, CA	6257
Erath, LA	6298	San Saba, TX	6228
Fitzgerald, GA	6224	Sheridan, AR	6455
Five Points, FL	6316	South Webster, OH	6208
Folsom, LA	6462	Staten Island, NY	6367
Fort Myers Villas, FL	6312	Stillwater, OK	6425
Georgetown, TX	6228	Tallison, AZ	6330
Gleneden Beach, OR	6464	Taos, NM	6295
Grifton, NC	6284	Templeton, CA	6214
Hazard, KY	6296	Texarkana, AR	6232
Hilo, HI	6427	Trenton, GA	6237
Huntingdon, PA	6293	Wahpeton, ND	6204
Huntsville, TX	6429	Warrenton, MO	6419
Jackson, MI	6285	Welch, WV	6421
Kailua-Kona, HI	6426	Winnebago, NE	6212
Kalamazoo, MI	6230	Woodstock, VA	6398
Kelso, WA	6311	Yreka, CA	6456

Subject Index
Volume 3
Issue 22

Subject	Page
General information	
Notice, filing of tariff to provide minimum	6301
Transition charges, computation of	
End User and Carrier Common Line, interim charges on	6301
Premium (MTS-WATS equivalent service included) charges	6301
Adjudication	
Administrative Law Judge Decision	
Abuse of process	6342
Integration of ownership into management, quantitative aspect	6216
Review Board or Commission Decision	
Air hazard	6285
Integration of ownership (qualitative), civic participation	6285, 6285,
Broadcast Radio Services - General Rules	
Program contents	
Candidates for public office	6279, 6248
Broadcasting - AM Stations	
Allocations and allotments	
Engineering standards of allocation	6431, 6444,
Facilities, showing required for	6444
Applications for new, additional or different facilities	
Facilities and overlap of signal strength contours	6214
Interference during operation	
Signal, computation of interfering	6431
Radiation	
Engineering charts and related formulas	6431
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	6220, 6224, 6228, 6281, 6283, 6284, 6208, 6210, 6319, 6320, 6311, 6312, 6317, 6398, 6426, 6427, 6454, 6455, 6461, 6462

Subject	Page
Broadcasting - Noncommercial Educational FM	
Services	
Subcarrier capacity, use of	6323
Carriers: Service Altered	
Cable television video programming facilities	
Video programming facilities by telephone common carriers	6303
Commercial Radio Operators	
Applications	
First class certificate, requirements for	6361
Commission Organization	
Delegations of authority - Chief, Mass Media Bureau	
Commission en banc, matters to be referred to the	6277
Common Carriers/Affiliates: Reports	
Depreciation rates, reports of proposed changes in	6389
Reports of common carriers, monthly	6261
Common Carriers: Miscellaneous Rules	
Allocation of costs to regulated or non-regulated costs	6258, 6259,
Enhanced services (computer) and customer-premises equipment	6247, 6414
Communications Act of 1934	
Common Carriers	
Accounts, records, memoranda,forms of; depreciation charges	6258, 6259,
Complaints to the commission	6413
Discrimination and preferences	6413
Extension of lines, certificate for	6469
Service and charges	6413
Radio, provisions for	
Candidates for public office, facilities for	6279, 6248
Radio, provisions relating to	
Applications;form of and conditions attached to licenses	6367, 6469
Construction permits	6367
Construction permits or licenses, modification of	6369, 6277
Licenses, limitation on holding and transfer of	6250, 6342
Sanctions, administrative	6342
Domestic Public Fixed Radio Services	
Applications and licenses, filing requirements	
Authorization required, station	6405
Forms for microwave/tv/multipoint/digital electronic, application	6405

Subject	Page
Jurisdictional Separations Procedures	
Facilities and property	
Circuit equipment (category 4), radio systems and	6465
Maritime Services	
Technical standards for coast and ship stations	
Transmitters (type accepted), licensing of	6239
Operational-Fixed Microwave Service, Private	
Requirements, general	
Frequencies, policies governing the assignment of	6257
Technical standards	
Frequencies available, tables of assignments of	6257
Practice and Procedure	
Application procedures, general	
Information furnished by applicants, changes in	6392
Common carriers: complaints	
Formal or informal	6467
Common carriers: financial and accounting reports/requests	
Financial reports, monthly	6261
Hearing proceedings: presiding officer's rulings	
Interlocutory ruling, appeal from	6339
Information, general	
Citation to FCC Record and FCC Reports	6405
Time, computation of	6276
Pleadings, briefs	
Extension of time, motions for	6303
Informal requests for Commission action, persons may make	6274
Proceedings, miscellaneous	
Forfeiture proceedings	6230
License or construction permit, Commission modification of	6277
Reconsideration/review of Commission action	
Reconsideration of a final FCC action, petition for	6230, 6305,
Public Mobile Service	
Applications and licenses-filing requirements	
Additional channels, conditions for granting applications in	6230
Applications and licenses-processing	
Construction, time period allowed for	6300, 6306
Mutually exclusive applications	6401

Subject	Page
Special Broadcast Services	
Instructional TV fixed service	
Frequency assignments available, table of	6392
Licensing requirements and eligibility factors	6392
Tariffs (Schedules of Rates and Regulations)	
General Information	
Explanatory statements to be clear and explicit	6360
Rules, general	
Letters of transmittal: supporting information to be submitted	6360
Telecommunications Companies: Classes A and B	
Nonregulated activities	6258, 6259,
Regulated accounts	6258, 6259,

TABLE OF STATUTORY AND RULE PROVISIONS

Page

(Abilene Radio Partnership) (Abilene, Texas) 6417
(Dennis N. O'Neal) (Laurel, Delaware) 6238
(Erath Broadcasting) (Erath, Louisiana) 6298
(Illini Broadcasting, Inc.) (Taos, New Mexico) 6295
(Image Broadcasting, Inc.) (Lowell, Arkansas) 6234
(Juniata College) (Huntingdon, Pennsylvania) 6293
(Kaw Valley Broadcasting Co.) (North Fort Riley, ... 6219
(Kennebunkport FM Limited) (Kennebunkport, Maine) 6415
(Michael R. Barnett & Robert L. Terry) (Hazard, Kentucky) 6296
(Pocahontas Broadcasting Company) (Welch, West Virginia) 6421
(RA-AD of Trenton, Inc.) (Trenton, Georgia) 6237
(Rollings Communications, Inc.) (Warrenton, Missouri) 6419
(State Line Broadcasting) (Texarkana, Arkansas) 6232
000.283 Authority delegated 6277
001.014 Informal Requests for Commission Action 6405
001.041 Informal requests for Commission action 6274
001.046 Motions for extension of time 6303
001.065 Substantial and significant changes in information f 6392
001.080 Forfeiture Proceedings 6230
001.087 Modification of license or construction permit on mo 6277
001.106 Petition for Reconsideration 6216
001.106 Petitions for reconsideration 6386
001.106(g) Petitions for reconsideration 6305
001.106(n) Petitions for Reconsideration 6230
001.301 Appeal, Granted 6339
001.711 Formal or informal complaints 6467
001.786 Monthly financial reports 6261
013.012 Additional requirements for First Class Radiotelegr 6361
021.003 Station Authorization Required 6405
021.007 Standard application forms for point-to-point microw 6405
022.016(c) Objective need Standards 6230
022.031 Mutually exclusive applications 6401
022.043 Period of Construction 6300
022.043 Period of contruction 6306
032.014 Regulated Accounts 6258
032.014 Regulated Accounts 6259
032.014 Regulated Accounts 6260
032.023 Nonregulated activities 6258
032.023 Nonregulated activities 6259
032.023 Nonregulated activities 6260
032.027 Transactions with affiliates 6258
032.027 Transactions with affiliates 6259
032.027 Transactions with affiliates 6260
036.126(e)(3) Central Office Equipment: Category 4 6465
036.380 Other Billing and Collecting Expense 6468
043.031 Monthly reports of Communications Common Carriers 6261
043.043 Reports of Proposed Changes in Depreciation Rates 6389
047.000 C.F.R. §64.702, Furnishing of Enhanced Services & C 6414
061.002, 61.38 Centel Petition for Waiver 6360
063.054 Facilities for provision of video programming 6303

064.901 Allocation of Costs 6258
064.901 Allocation of Costs 6259
064.901 Allocation of Costs 6260
064.901 Allocation of Costs 6465
073.024 Broadcast facilities; showing required 6444
073.182 Engineering Standards of Allocation 6431
073.182 Enginering standards of allocation 6444
073.185 Computation of Interfering Signal 6431
073.190 Engineering Charts and Related Formulas 6431
073.1940 Broadcasts by candidates for public office 6248
073.1940 Broadcasts by candidates for public office 6279
073.202 FM Table of Allotments 6220
073.202 FM Table of Allotments 6228
073.202 FM Table of Allotments 6311
073.202 FM Table of Allotments 6318
073.202 FM Table of Allotments 6319
073.202 FM Table of Allotments 6320
073.202 FM Table of Allotments 6321
073.202 FM Table of Allotments 6322
073.202 FM Table of Allotments 6398
073.202 FM Table of Allotments 6426
073.202 FM Table of Allotments 6427
073.202 FM Table of Allotments 6428
073.202 FM Table of Allotments 6429
073.202 FM Table of Allotments 6454
073.202 FM Table of Allotments 6455
073.202 FM Table of Allotments 6458
073.202 FM Table of Allotments 6461
073.202 FM Table of Allotments 6462
073.202, FM Table of Allotments 6204
073.202, FM Table of Allotments 6206
073.202, FM Table of Allotments 6208
073.202, FM Table of Allotments 6210
073.202, FM Table of Allotments 6212
073.202, FM Table of Allotments 6222
073.202, FM Table of Allotments 6224
073.202, FM Table of Allotments 6226
073.202, FM Table of Allotments 6281
073.202, FM Table of Allotments 6282
073.202, FM Table of Allotments 6283
073.202, FM Table of Allotments 6284
073.202, FM Table of Allotments 6312
073.202, FM Table of Allotments 6314
073.202, FM Table of Allotments 6316
073.202, FM Table of Allotments 6317
073.202, FM Table of Allotments 6423
073.202, FM Table of Allotments 6425
073.202, FM Table of Allotments 6464
073.3540 Application for voluntary assignment or transfer of 6242
073.37 Co-channel overlap 6214
073.593 Subsidiary communications services 6323
073.606 TV Table of Allotments 6456
074.902 Frequency assignments 6392
074.932 Eligibility and licensing requirements 6392

080.157 Radio officer defined 6361
080.203 Authorization of transmitters for licensing 6239
094.015(d) Policy governing the assignment of frequencies 6257
094.065 Frequencies 6257
201.000(b) and 204 6409
300.012 Administrative Sanctions 6230
300.201 Services and Charges 6413
300.202 Discrimination and Preferences 6413
300.208 Complaints to the Commission 6413
300.220 Accounts, Records, Memoranda, Depreciation Charges 6389
300.220 Accounts, Records, and Memoranda; Depreciation Charg 6258
300.220 Accounts, Records, and Memoranda; Depreciation Charg 6259
300.220 Accounts, Records, and Memoranda; Depreciation Charg 6260
300.309, Action Upon Applications; Form of an conditions att 6367
300.310(d) Illegal transfer of control 6342
300.310(d) Transfer of License to Trust 6250
300.312(a) Revocation of license 6342
300.315 Facilities for candidates for public office 6248
300.315 Facilities for candidates for public office 6279
300.316 Modification by Commission of construction permits o 6277
300.316 Modification of License 6369
300.319, Construction Permits 6367
47 C.F.R. § 64.702, Furnishing of Enhanced Services and CPE 6247
47 CFR Part 73, Radio Broadcasting 6448
47 CFR Part 73.182 Engineering Standards of Allocation 6448
500.2020 Integration of Ownership (qualitative), female owne 6285
500.2025 Integration of Ownership (qualitative), local resid 6285
500.2030 Integration of Ownership (qualitative), minority ow 6285
500.2015 Integration of Ownership (qualitative), civic parti 6285
500.2145 Air hazard issue 6285
500.3035 Integration of Ownership into management, quantitat 6216
500.3035 Integration, quantitative 6330
500.3095 character qualifications 6242
500.3100 Abuse of process, distress sale 6342
500.3210 Standing 6214
503(b) Forfeiture in cases of Rebates and Offsets 6230
Functions of the Bureau 6277
Order on Reconsideration 6375
Part 43 Reports of Communication Common Carriers and Certain 6375
Sec.1.4 Amendment of the Rules Regarding Computation of Time 6276
Sections 69.3(a), 69.5(d), 69.203(a), 69.205, and 69.612 6301

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-498

In the Matter of

Amendment of Section 73.202(b), RM-6486
Table of Allotments,
FM Broadcast Stations.
(Wahpeton, North Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 23, 1988; Released: October 24, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Guderian Broadcasting, Inc. (petitioner), requesting the substitution of Channel 295C2 for Channel 296A at Wahpeton, North Dakota, and the modification of its construction permit for Station KGWB to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 295C2 can be allotted to Wahpeton in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.6 kilometers (5.3 miles) northeast to avoid a short-spacing to Station KGIM-FM, Channel 294C1, Aberdeen, South Dakota.[1] Canadian concurrence in the allotment must be received since Wahpeton is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the substitution of Channel 295C2 for Channel 296A at Wahpeton, North Dakota, since it could provide the community and the surrounding area with its first local wide coverage area FM service. As requested, we shall also propose to modify Station KGWB's construction permit to specify operation on adjacent Channel 295C2. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Wahpeton or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such other parties. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Wahpeton, North Dakota	296A	295C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 15, 1988,** and reply comments on or before **December 30, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Samuel Miller, Esq.
Miller & Fields, P.C.
1990 M Street, N.W., Suite 760
Washington, D.C. 20036

Vincent A. Pepper
Pepper & Corazzini
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 46-18-00 and West Longitude 96-29-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-499

In the Matter of

Amendment of Section 73.202(b), RM-6435
Table of Allotments,
FM Broadcast Stations.
(Lumpkin, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 23, 1988; Released: October 24, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by William L. Taylor, Jr. (petitioner), requesting the allotment of Channel 257C2 to Lumpkin, Georgia, as the community's first local FM service. Petitioner states that he will file an application for use of the channel, if allotted. Channel 257C2 can be allotted to Lumpkin in compliance with the Commission's minimum distance separation requirements with a site restriction of 19 kilometers (18.8 miles) southwest to avoid a short-spacing to Station WAYS, Channel 256C1, Macon, Georgia, and to the construction permit of Station WDMG-FM, Channel 258C, Douglas, Georgia.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 257C2 to Lumpkin, Georgia, as the community's first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Lumpkin, Georgia	–	257C2

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **December 15, 1988,** and reply comments on or before **December 30, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William L. Taylor, Jr.
1444 Dauset Drive
Griffin, Georgia 30223
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comment so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment at North Latitude 31-54-30 and West Longitude 84-54-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-500

In the Matter of

Amendment of Section 73.202(b), RM-6436
Table of Allotments,
FM Broadcast Stations.
(South Webster, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1988; Released: October 24, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Christian R. Caggiano (petitioner), requesting the allotment of Channel 235A to South Webster, Ohio, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted.

2. Channel 235A can be allotted to South Webster in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.3 kilometers (1.4 miles) east to avoid a short-spacing to the pending application of Station WLLT, Channel 235B, Fairfield, Ohio, to relocate its transmitter and improve its facilities (BPH-880304IA).[1] Canadian concurrence in the allotment is required since South Webster is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 235A to South Webster, Ohio, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
South Webster, Ohio	--	235A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 15, 1988,** and reply comments on or before **December 30, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Christian R. Caggiano
8126 Sagimore Court
Ft. Wayne, Indiana 46835
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 38-48-48 and West Longitude 82-42-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-501

In the Matter of

Amendment of Section 73.202(b), RM-6450
Table of Allotments,
FM Broadcast Stations.
(Clearwater, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1988; Released: October 24, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Gulf Coast Radio, Inc. (petitioner) requesting the substitution of Channel 250C for Channel 250C1 at Clearwater, Florida, and the modification of its license for Station WKRL(FM) to specify operation on the higher powered channel. Channel 250C can be allotted to Clearwater in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.1 kilometers (9.4 miles) northeast to accommodate petitioner's desired transmitter location.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 250C for Channel 250C1 at Clearwater, Florida, since it could allow Station WKRL(FM) to expand its service area. As requested, we shall also propose to modify the license of Station WKRL(FM) to specify operation on the hgher powered channel. In accordance with Section 1.420 of the Commission's Rules, we shall not accept competing expressions of interest in use of the channel at Clearwater or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Clearwater, Florida	239C1, 250C1	239C1, 250C

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **December 15, 1988,** and reply comments on or before **December 30, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Donald P. Zeifang, Esq.
Jack W. Whitley, Esq.
Baker & Hostetler
1050 Connecticut Avenue, N.W., Suite 1100
Washington, D.C. 20036
(Counsel to petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 28-02-34 and West Longitude 82-40-16.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-502

In the Matter of

Amendment of Section 73.202(b), RM-6449
Table of Allotments,
FM Broadcast Stations.
(Winnebago, Nebraska)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1988; Released: October 24, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Gary L. Violet (petitioner), requesting the substitution of Channel 289C2 for Channel 289A at Winnebago, Nebraska, and the modification of his construction permit for Station KSUX to specify the higher powered channel. Petitioner states that he will apply for the channel, if allotted. Channel 289C2 can be allotted to Winnebago in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.4 kilometers (8.3 miles) north to avoid a short-spacing to Station KFMT, Channel 288A, Fremont, Nebraska.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 289C2 for Channel 289A at Winnebago, Nebraska, since it could permit expanded service to the area by Station KSUX. As requested, we shall also propose to modify petitioner's construction permit to specify the higher powered channel. In accordance with Section 1.420 of the Commission's Rules, we shall not accept competing expressions of interest in use of the higher powered channel at Winnebago or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Winnebago, Nebraska	289A	289C2

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **December 15, 1988,** and reply comments on or before **December 30, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Leonard S. Joyce, Esq.
Blair, Joyce & Silva
1825 K Street, N.W.
Washington, D.C. 20006
(Counsel to petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 42-21-21 and West Longitude 96-29-01.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-92

In re Applications of

WILLIAM L. ZAWILA File No. BP-851126AF
Templeton, California

For Construction Permit
for a New AM Station

MEMORANDUM OPINION AND ORDER

Adopted: October 7, 1988 Released: October 26, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN.

1. The Review Board has under consideration a "Petition for Leave to File Extraordinary Pleading" filed on June 14, 1988 by Garry and Virginia Infante Brill (Brill), responsive pleadings filed on June 23, 1988 by the Mass Media Bureau (an "Opposition) and by William L. Zawila (a "Motion to Strike Or, Alternatively to Deny), and a "Reply" filed on July 1, 1988 by Brill. Brill seeks reversal of the *Summary Decision*, 3 FCC Rcd 2868 (1988), of presiding Administrative Law Judge Walter C. Miller (ALJ), which decision granted Zawila's application for a construction permit for a new AM station at Templeton, California. We shall dismiss the Brill petition because, given the procedural posture of this proceeding, the petitioner lacks standing to raise this matter with the Board.

2. By *Hearing Designation Order*, 3 FCC Rcd 1669 (1988) (*HDO*), the Commission designated for consolidated hearing the Zawila application proposing to serve Templeton, California on standard broadcast (AM) frequency 1060 kHz and an application (File No. BP-860627AD) filed by Brill also proposing to serve Templeton, but using standard broadcast (AM) frequency 720 kHz. The Zawila and Brill applications were deemed to be mutually exclusive solely because both applicants relied upon the "first AM broadcast facility" exemption for co-channel station contour overlap otherwise prohibited by Section 73.37 of the Rules, 47 CFR §73.37. *See* Mass Media Bureau Opposition at para. 2.[1] That is, Section 73.37(a) prohibits acceptance for filing of a new application if, *inter alia*, the proposed 0.5 mV/m signal strength contour overlaps the 0.025 mV/m contour of an existing co-channel station. The proposed Zawila 0.5 mV/m contour overlaps the 0.025 mV/m contour of co-channel Station KPAY, Chico, California; and it appeared when the applications were processed that the proposed Brill 0.5 mV/m contour would overlap the 0.025 mV/m contour of co-channel Station KDWN, Las Vegas, Nevada.

3. On April 13, 1988, Brill filed a petition for leave to amend, submitting a revised engineering showing which demonstrated that Brill's proposal in fact complied with the "no overlap" requirements of Section 73.37(a) and that, therefore, Brill did not need to rely upon the Section 73.37(b) exemption. Contemporaneously, Brill filed a "Petition to Sever Application from Comparative Proceeding," requesting that its application be severed from the instant proceeding and granted and asserting that "grant of its instant application would not prohibit grant of Zawila's application: the two applications are not mutually exclusive." Brill Petition to Sever at 2. The ALJ granted these petitions, and severed and granted the Brill application. *Memorandum Opinion and Orders*, FCC 88M-1276 (amendment) and FCC 88M-1277 (severance and grant), released April 28, 1988. On May 6, 1988, Zawila filed a "Motion for Summary Decision." On May 19, 1988, the ALJ granted this unopposed motion, finding that Zawila had met the site availability and blanketing issues specified against him in the *HDO*, and granted his application.

4. On June 14, 1988, Brill filed its instant "Extraordinary Pleading" with the Board, alleging that the Zawila application is not grantable because it no longer qualifies for a Section 73.37(b) exemption in that "Zawila will not provide a first local AM service to Templeton since the Brill[] application for that community was granted first." Brill Petition for Leave to File Extraordinary Pleading at 2. The Media Bureau opposes this petition, stating that the Brill grant is not final and that, in essence, the Brill and Zawila grants should be viewed as having been simultaneously made. The Media Bureau further notes that Zawila fully disclosed his overlap problem in his application, that the area of overlap is small and involves only interference to Zawila's proposed station, and not interference caused by Zawila's station. Zawila argues that Brill's "Extraordinary Pleading" is essentially an untimely appeal, pursuant to 47 CFR §1.302, and should therefore be stricken and that Section 73.37 is an application processing rule applied to determine if applications are "acceptable for filing" rather than to determine if applications previously accepted for filing (such as Zawila's) are "grantable." Brill replies that its own grant is final whereas Zawila's is not, and reiterates that the Zawila application is not grantable under Section 73.37. Nevertheless, Brill concedes that "Brill did not appeal the [Summary] Decision granting Zawila's application [and that,] when Zawila's application was granted, Brill was no longer a party to this proceeding." Brill Reply at 2.

5. We will dismiss Brill's "Extraordinary Pleading" because, as Brill itself concedes (Brill Reply at 2), it is no longer a party in this proceeding -- nor does it now seek party status -- and therefore Brill lacks standing to challenge the Zawila grant before the Board. "[I]t is well established that former applicants, without more, cannot qualify as parties in interest." *Denton FM Radio, Ltd.*, 56 RR 2d 171, 172 (Rev. Bd. 1984) (citing *Kenneth J. Crosthwait*, 79 FCC 2d 191, 194 (1980); *Frontier Broadcasting Co.*, 21 FCC 2d 570 (1970); *Chapman Radio and Television Co.*, 1 FCC 2d 1158 (Rev. Bd. 1965); *Cleveland Broadcasting, Inc.*, 12 FCC 2d 1008 (1968), *recon. dismissed*, 15 FCC 2d 311 (1968)(potential applicant lacks standing)). And, only parties may file exceptions before the Board, *see* 47 CFR §1.276(a)(1), or appeal an ALJ's final ruling to the Board, *see* 47 CFR §1.302(a). *See Trustees of the University of Pennsylvania* (*WXPN (FM)*), 69 FCC 2d 1394, 1430 n.80 (1978), *aff'd*, 71 FCC 2d 416 (1979). Thus, whether Brill intends its pleading as exceptions or as an appeal, it lacks standing in either case to bring its complaint before the Board. Nor can it claim

standing based on electrical interference because, as indicated at paragraph 2, *supra*, the Brill and Zawila applications are uncontrovertibly not electrically mutually exclusive. Whatever relief or further action, if any, is now appropriate in this proceeding, *e.g.*, rescission of either grant, waiver of 47 CFR §73.37(a) to permit operation of both facilities, *et cetera*, is a matter only the Commission may address, and Brill must seek its recourse there.

6. ACCORDINGLY, IT IS ORDERED, That the "Petition for Leave to File Extraordinary Pleading" filed on June 14, 1988 by Garry and Virginia Infante Brill IS DISMISSED, and the "Motion to Strike Or, Alternatively to Deny" filed on June 23, 1988 by William L. Zawila IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTE

[1] Section 73.37(b) provides as follows:

> An application for a new daytime station or a change in the daytime facilities of an existing station may be granted notwithstandingoverlap of the proposed 0.5 mV/m contour and the 0.025 mV/m contour of another co-channel station, where the applicant station is or would be the first AM broadcast facility in a community of any size wholly outside of an urbanized area or the first AM broadcast facility in a community of 25,000 or more population wholly or partly within an urbanized area [for the purpose of this rule, urbanized area refers to such areas listed by the latest Census provided they also contain an incorporated place of at least 50,000 population], or when the facilities proposed would provide a first primary service to at least 25 percent of the interference-free area within the proposed 0.5 mV/m contour, provided that:
>
> (1) The proposal complies with paragraph (a) of this section in all other respects and is consistent with all other provisions of this part; and
>
> (2) No overlap would occur between the 1 mV/m contour of the proposed facilities and the 0.05 mV/m contour of any co-channel station.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket Nos. 83-911 *et al.*

In re Applications of

RELIGIOUS BROADCASTING
NETWORK *et al.*
San Bernardino, California

For Construction Permit for a
New Television Station
San Bernardino, California

MEMORANDUM OPINION AND ORDER

Adopted: October 11, 1988; Released: October 26, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. In a *Decision*, 3 FCC Rcd 4085 (released July 5, 1988), the Review Board upheld the permit award of Administrative Law Judge Joseph P. Gonzales' *Initial Decision* (2 FCC Rcd 6561) in the above-styled proceeding, granting the application of Channel 30, Inc. for authority to construct a new commercial television broadcast station on Channel 30 at San Bernardino, California, and denying eleven competing applications for that same facility. The Board's *Decision* primarily turned on the applicants' respective quantitative and qualitative fulltime "integration" proposals adduced under the standard comparative issue. 3 FCC Rcd at 4101. Now before the Board are petitions for reconsideration of that *Decision* filed by Buenavision Broadcasters (Buenavision) on August 4, 1988, and by Solano Broadcasting Limited (Solano) and Inland Empire Television (Inland Empire) on August 5, 1988, respectively, and responsive pleadings thereto.

PETITION OF BUENAVISION

2. The Board's *Decision* affirmed the ALJ's ruling that Buenavision was not entitled to the 100% quantitative "integration" credit sought because: (1) the applicant was not secured by a written partnership agreement at any time during the application process or the hearing (relying on *Payne Communications, Inc.*, 1 FCC Rcd 1052, 1055-1057 (Rev. Bd. 1986)); and (2) the applicant's 51% partner, H. Frank Dominguez, had not treated the entity as a true partnership, but more as a sole proprietor wherein two other purported principals were "nothing more than nominal partners with no influence or control" over that applicant's affairs. *Decision*, para. 27. In sustaining the ALJ, the Board rejected arguments raised in exceptions by Buenavision that the applicant should not be bound by *Payne* retroactively, and that the "nominal" partners were genuine partners who would have ownership responsibilites at the proposed station. *Id.*, paras. 27-29. Buenavision's petition for reconsideration now repeats the same arguments rejected earlier in our *Decision*. We will therefore deny Buenavision's petition for reconsideration because it fails to raise any new matter warranting further treatment by the Board or reconsideration of our *Decision*. It is well-settled that reconsideration will not be granted merely to reargue matters previously considered and resolved. *See WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Company v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

PETITIONS OF SOLANO AND INLAND EMPIRE

3. The petitions of Solano and Inland Empire seek, respectively, to increase their quantitative credit for integration of ownership with station management. Both were downgraded on this very important comparative criterion because they sought to have attorney-principals considered as "passive" investors, thus omitting the significant equity interests of those attorneys from the overall "integration" calculus. *See Decision*, paras. 23-24 (Solano); *id.*, para. 40 (Inland Empire). In reducing the potential quantitative "integration" credit for both of these applicants, the Board relied upon, *inter alia*, the Commission's stated view that an attorney who provides legal services to an entity and, at the same time, remains a principal thereof, is the "antithesis of a passive investor." *Id.*, at para. 23, quoting *Clarification on Ownership Attribution*, 1 FCC Rcd 802, 804 (1986). Both of these petitioners raise similiar arguments as to why their particular attorney-principals should not be regarded as "active" for FCC comparative purposes. We review their arguments, because if their proposed "integration" factors were fully restored, both would present very competitive profiles compared to the top three applicants discussed in our *Decision*.

4. Initially, both Solano and Inland Empire lean heavily upon the Commission's decision in *Victory Media*, 3 FCC Rcd 2073 (1988), for the proposition that attorneys who actively take part in their entity's affairs, even to the point of helping to prosecute that application through the FCC, can yet be regarded as mere "passive" investors for comparative purposes.[1] However, the Board expressly recognized that it may not have properly applied the Commission's stated presumption with respect to attorney-principals in *Victory Media*, *see Decision* at n. 40,[2] just as in an earlier case the Board had candidly acknowledged that the Commission's specific policy view of attorneys who provide applicant services and advice was neither raised, briefed, nor argued in *Victory Media*. *Mark L. Wodlinger*, 3 FCC Rcd 3139, 3144-3145 n.4. (Rev. Bd. 1988). Moreover, in a contemporary case, *Tulsa Broadcasting Group*, 2 FCC Rcd 6124 (Rev. Bd. 1987), the Board also refused to regard an applicant's attorney-principals who had been involved in fundamental business and licensing affairs as "passive" principals, *see id.*, at 6129-6130, and the Commission has recently declined to review the *Tulsa* decision.[3] Finally, we note that the Commission itself has just requested the *Victory Media* parties to comment on the merits of a pending petition for reconsideration in that case. *See Order*, FCC 88I-093, released September 22, 1988.

5. Both Solano and Inland Empire next argue that the record below did not establish that various of the attorney-principals of the respective applicants were professionally involved in the basic organizational and policy

affairs of their applicants. It is argued that many, if not most, of the equity holding attorneys involved either performed absolutely no professional services for their applicant, or that any such activities were of preliminary nature of the type the Commission did not consider in *Tulsa Broadcasting Group, supra*. In prior recent cases, where we have found that attorney-principals have played an active and influential role in an applicant's managerial activities, so much so that they could not be regarded simply as "passive" financiers (in the manner of banks or remote investment syndicates), the record in those cases was quite plain that the subject attorneys were not "passive" or likely to remain so. *See Tulsa Broadcasting Group*, 2 FCC Rcd at 6130; *Stanly Group Broadcasting, Inc.*, FCC 88R-47, released August 16, 1988 at para. 14; *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3953 (Rev. Bd. 1988), *recon. denied*, FCC 88R-52, released September 23, 1988; *Mark L. Wodlinger, supra*, 3 FCC Rcd at 3141.[4]

6. Based on the petitions for reconsideration of Solano and Inland Empire, the Board has revisited the extensive record in this case to determine whether the evidence regarding each of the multitude of attorney-principals most clearly reflects the actual roles played by those particular attorneys. While we find it clear that certain of the instant attorneys were more than "passive" investors, we believe that the record in this case would benefit from an augmentation that pinpoints the activities of other attorneys, their participation in the business and policy decisions of the applicants, the nature and extent of their "investments," as well as their likely role in the future affairs of the entities of which they are principals.

7. Accordingly, we will remand this case to the ALJ for the preparation of a supplemental initial decision to focus on the actual roles of the various attorney-principals of these two applicants. If it appears that any of the attorney-principals performed no significant legal or consultative services for the entity, and have been merely incidental financial benefactors, we shall duly revise our *Decision*. In compiling the evidence in this supplemental hearing, we do offer certain caveats: first, we would not expect these two applicants to assert either form of attorney-client privilege with respect to internal communications; second, insofar as various of the attorney-principals are (or were) partners and/or associates in the same law firm, any intra-firm communications between such principals relating to their respective applicant entities will be deemed relevant; and, third, all attorneys participating in the supplemental hearing are reminded of the ethical restrictions on lawyers appearing as witnesses and/or prejudicing the case of other applicant principals. *See* , *e.g.*, Proposed Rules of Professional Conduct, District of Columbia Court of Appeals, No. M-165-88, filed September 1, 1988, Rule 3.7. Further, to the extent that the supplemental record reflects that an attorney-principal has not been a mere "passive" investor in the applicant, the parties in their proposed conclusions of law shall brief for the ALJ the question of whether the activities of any "active" attorney-principal should be imputed to other applicant principals in that same law firm, under the general tenets of partnership law or the laws of agency. The Board recognizes that the foregoing matters may place a strain on both representational functions and the hearing process itself. But, we believe these conditions are unavoidable where attorneys who may have taken an active role in counseling an applicant, or in structuring an applicant's entity as to rights and duties of partners or stockholders, *etc.*, seek to have themselves later regarded as mere "passive" investors, thus conferring a vital comparative advantage on their applicant. As our *Decision* in this case reflects, and for better or worse, slight percentage differences in quantitative "integration" credit have become a most critical factor in determining license awards. Given that condition, it behooves agency adjudicators to very carefully apportion "integration" credit, and to thwart improper gamesmanship.

8. Inasmuch as we are remanding this case for further evidentiary hearing, it will also be necessary to examine the *bona fides* of Solano's "integration" proposal in other crucial respects. In our *Decision*, we opined that several (if not all) of Solano's putative "general" partners appear to have exuded a pronounced ignorance of the entity they claimed to exclusively control, *see id.*, para. 25, including the very nature of their own financial obligations and the reliability of the alleged sources of Solano's required financing.[5] We tangentially commented that "Solano could not receive a grant here without a remand for evidentiary hearing to determine the basis on which its general partners certified their financial qualifications to the Commission." *Id.*, at para. 50. In trying this issue, the ALJ should consider the prior testimony of Solano's principals, note any inconsistencies, and draw natural and reasonable inferences from any contradictions. *See Pepper Schultz*, 3 FCC Rcd 1200 (1988)(Comm'n remand for further hearing); *see also TeleSTAR, Inc.*, 2 FCC Rcd 7352 (1987)(same).

9. ACCORDINGLY, IT IS ORDERED, That the petitions for reconsideration filed August 5, 1988 by Solano Broadcasting Limited and Inland Empire Television, respectively, ARE GRANTED to the extent indicated herein and otherwise DENIED; that the petition for reconsideration filed August 4, 1988 by Buenavision Broadcasters IS DENIED; and that the motion for acceptance of petition in excess of page limitation filed August 8, 1988 by Solano Broadcasting Limited IS GRANTED; and

10. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for further hearing in accordance with this opinion and for the preparation of such Supplemental Initial Decision as may be warranted by a supplemental record.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] *See* Solano Petition at 9-12; Inland Empire Petition at 4-7.

[2] In light thereof, we are puzzled by Solano's assertion that "[f]or reasons which pass understanding, the Board did not even discuss the *Victory Media* case in its *Decision* with respect to the attorney-principals' involvement in the Solano application." Solano Petition at 10.

[3] FCC 83-238, released August 26, 1988.

[4] As the Board made clear in both *Mark L. Wodlinger, Washoe Shoshone*, and *Stanly Group*, the question of whether an attorney-principal's equity interest should be omitted for "integration" calculation purposes does not turn upon the type of equity inter-

est (*i.e.*, non-voting corporate shares or "limited" partnership interests), the helpful comments of SSP and Channel 30 notwithstanding. SSP Opposition to Petitions at 7-8; Channel 30 Opposition to Solano Petition at 11 n.6. As the Commission just recently explained to the court:

> The Commission is mindful, nonetheless, that an applicant may present a favorable formal structure on paper in order to gain a preference, but i reality that structure is not an accurate depiction of how the licensee's affairs will be managed. Thus, limited partners or non-voting stockholders, although nominally without influence over the applicant, may actually participate in (if not control) the applicant's decision-making process. In those instances, the Commission will disregard the applicant's formal ownership structure and treat the nominal passive owners (*i.e.*, non-voting stockholders or limited partners) as if they were active in the management of the applicant and consider them in any integration analysis. *See e.g., Signal Ministries, Inc.*, 104 FCC 2d 1481, 1493-1497 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1259 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v.* FCC, 838 F.2d 571 (D.C. Cir. 1988) (table); KIST Corp., 102 FCC 2d 288 (1985), *aff'd per curiam sub nom. United American Telecasters, Inc. v.* FCC, 801 F.2d 1436 (D.C. Cir. 1986) (table), *cert. denied*, 107 S.Ct. 2182 (1987); *Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419 (Rev. Bd. 1977). *See also Cleveland Television Corp. v.* FCC, 732 F.2d 962, 969 (D.C. Cir. 1984). "[W]here there is a basis in the record for inferring that non-voting shareholders will exercise influence or control of an ongoing business," an applicant's integration proposal will be disregarded. *Victory Media*, 3 FCC Rcd at 2075.

Brief for Appellee at 6-7, *Spectron Broadcasting Corp.* v. FCC, No. 87-1635 (D.C. Cir.), a case which the court *aff'd* per judgment on September 29, 1988. Indeed, in *Stanly Group*, the "active" attorney-principal who held non-voting shares was asked whether the Board should distinguish attorney equity interests on the basis of equity form, *viz.*, non-voting shares vis a vis "limited" partnership shares; and the subject attorney candidly replied:

> . . . I don't believe that the Board could distinguish, or should distinguish between the limited partnership passive investment than that of a preferred shareholder passive investor. I believe they're basically about the same, and they're treated that way throughout the law. And I would think that they would be treated that way by the Commission.

FCC 88R-47, at para. 14.

[5] *See also, e.g.*, Sandino Opposition to Solano Petition at 12-15; Channel 30 Opposition to Solano Petition at 13-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-427

In re Applications of

KAW VALLEY BROADCASTING CO. File No. BPH-870710ME

NORTH FORT RILEY RADIO, INC. File No. BPH-870710MV

ANITA KAY COCHRAN File No. BPH-870710NE

For Construction Permit for a New FM Station in North Fort Riley, Kansas. Channel 273C2 (102.5 MHz)

ERRATUM

Released: October 7, 1988

The hearing Designation Order in MM Docket No. 88-427, DA 88-1291 (released September 20, 1988), contains an error in Paragraph 4 and 9. These sections of the order are hereby deleted, since the amendment in question was timely filed.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-503

In the Matter of

Amendment of Section 73.202(b), RM-6422
Table of Allotments,
FM Broadcast Stations.
(Bowling Green, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 23, 1988; Released: October 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. Rappahannock Communications Group (petitioner), has a petition for rule making before the Commission for consideration requesting the allotment of Channel 245A to Bowling Green, Virginia, as that community's first local FM service. Petitioner submitted information in support of its proposal and states its intention to apply for the channel, if allotted.

2. Channel 245A can be allotted to Bowling Green consistent with the Commission's minimum distance separation requirements with a site restriction of 1.8 kilometers (1.1 miles) south of the city.[1] The restricted site is necessary in order to avoid a short spacing to Station WASH(FM), Channel 246B, Washington, D. C.

3. In view of the fact that Bowling Green, Virginia could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Bowling Green, Virginia	---	245A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 16, 1988,** and reply comments on or before **January 3, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Denise B. Moline, Esquire
Putbrese & Hunsaker
6800 Fleetwood Road
P. O. Box 539
McLean, Virginia 22101
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

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is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The restricted site coordinates are 38-02-03 and 77-21-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-504

In the Matter of

Amendment of Section 73.202(b), RM-6444
Table of Allotments,
FM Broadcast Stations.
(Ossian, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 30, 1988; Released: October 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Mega Media, Ltd. (petitioner), requesting the allotment of Channel 236A to Ossian, Iowa, as the community's first local FM service, and its deletion from New Hampton, Iowa, where it is unoccupied and unapplied for. Channel 236A can be allotted to Ossian in compliance with the Commission's minimum distance separation requirements if the channel is removed from New Hampton. Petitioner states that it will apply for the channel, if allotted.

2. Channel 236A was allotted to New Hampton in MM Docket 84-231 and no applications were filed by the close of the filing window on April 21, 1988. However, we have found that it is not necessary to delete the New Hampton allotment in order to provide Ossian with its first local FM service. A staff engineering study has found that Channel 241A can be allotted to Ossian in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Therefore, we shall substitute Channel 241A for consideration herein.

3. We believe the public interest would be served by proposing the allotment of Channel 241A to Ossian, Iowa, since an interest has been expressed in providing the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ossian, Iowa	--	241A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 16, 1988,** and reply comments on or before **January 3, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robyn G. Nietert, Esq.
Brown, Finn & Nietert, Chartered
1920 N Street, N.W., Suite 510
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 43-08-42 and West Longitude 91-45-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-505

In the Matter of

Amendment of Section 73.202(b), RM-6447
Table of Allotments,
FM Broadcast Stations.
(Fitzgerald, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 23, 1988; Released: October 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by William L. Taylor, Jr. (petitioner), requesting the allotment of Channel 245A to Fitzgerald, Georgia, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted. Channel 245A can be allotted to Fitzgerald in compliance with the Commission's minimum distance separation requirements with a site restriction of 12 kilometers (7.5 miles) north to avoid a short-spacing to the proposed substitution of Channel 244C2 for Channel 244A at Valdosta, Georgia, and the modification of Station WZLS(FM)'s license accordingly (RM-6359).[1]

2. We believe the public interest would be served by proposing the allotment of Channel 245A to Fitzgerald, Georgia, since an interest has been expressed in providing the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Fitzgerald, Georgia	--	245A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **December 16, 1988,** and reply comments on or before **January 3, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William L. Taylor, Jr.
1444 Dauset Drive
Griffin, Georgia 30223
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 31-49-25 and West Longitude 83-14-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-506

In the Matter of

Amendment of Section 73.202(b), RM-6446
Table of Allotments,
FM Broadcast Stations.
(Martin, South Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 30, 1988; Released: October 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by the South Dakota State Board of Directors for Educational Television (petitioner) requesting the allotment of Channel 273C1 to Martin, South Dakota, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner, the public broadcasting agency of the State of South Dakota, seeks the allotment of Channel 273C1 to Martin so that it can operate the station as part of its state-wide educational system. In furtherance of this goal, it requests that Channel 273C1 be reserved for noncommercial educational use. Petitioner states that there are channels available for use in the noncommercial band. However, it seeks the allotment and reservation of a commercial channel so as to avoid the possibility of interference to the reception of Station KPLO-TV, Channel 6, at Reliance, South Dakota. While Martin is located outside the Grade B contour of Station KPLO-TV, petitioner points out that it intends to serve population and areas which do receive service from the TV Channel 6 station. In addition, it believes that the allotment and reservation of a commercial channel would eliminate possible interference to television translator station K06JY at Martin which rebroadcasts the signal of Station KIVV-TV, Lead, South Dakota. It concludes that while it would prefer the reservation of Channel 273C1 at Martin for noncommercial educational use, it will seek authorization to construct the station regardless of its commercial or noncommercial status.

3. Generally, noncommercial educational stations operate only on channels within the educationally reserved portion of the spectrum (Channels 201-220). Exceptions to this policy have fallen into one of two categories, either (1) channels in the noncommercial band are not available because of Canadian or Mexican allotments, or (2) the use of the channels in the noncommercial educational band may result in potential interference to television operations on VHF Channel 6. *See Comobabi, Arizona*, 47 Fed. Reg. 32717, published July 29, 1982, and *Burlington and Newport, Vermont*, 45 R.R. 2d 786 (1979). In this instance, petitioner acknowledges that neither situation exists and that there are, in fact, channels available within the noncommercial educational portion of the FM band. Therefore, we shall not propose to allot Channel 273C1 to Martin as channel reserved for noncommercial educational use. We shall, however, propose the allotment of the channel on a non-reserved basis, in light of petitioner's expressed willingness to apply for the channel even if it is not reserved for noncommercial educational use.

4. We believe the public interest would be served by proposing the allotment of Channel 273C1 to Martin, South Dakota, as the community's first local FM service. Channel 273C1 can be allotted to Martin in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Martin, South Dakota	--	273C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 16, 1988,** and reply comments on or before **January 3, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Roy R. Russo, Esq.
Richard A. Helmick, Esq.
Cohn and Marks
1333 New Hampshire Avenue, N.W., Suite 600
Washington, D.C. 20036
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such

a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 43-10-30 and West Longitude 101-44-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-232

In the Matter of

Amendment of Section 73.202(b), RM-6310
Table of Allotments,
FM Broadcast Stations.
(Georgetown, Marlin and San Saba,
Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: October 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making and Order to Show Cause*, 3 FCC Rcd 23135 (1988), issued at the request of Capitol Broadcasting Corporation (petitioner), licensee of Station KQFX(FM), Channel 243C2 at Georgetown, Texas, proposing the substitution of Channel 244C1 for Channel 243C2 at Georgetown, and modification of its license accordingly. In order to accomplish the Georgetown substitution, the *Notice* also proposed the substitution of Channel 225A for Channel 244A at Marlin, Texas, and the modification of the license for Station KRXX(FM) at Marlin to specify the new channel, as well as the substitution of Channel 246A for vacant and applied for Channel 244A at San Saba, Texas. Petitioner submitted supporting comments reiterating its commitment to effectuate the improved facilities at Georgetown. Armadillo Broadcasting, Inc. (Armadillo), the sole applicant for Channel 244A at San Saba, filed supporting comments. The licensee of Station KRXX(FM), Crowder Broadcasting Corporation (Crowder),[1] responded to the *Show Cause Order* in support of the proposal.

2. Channel 244C1 can be substituted for Channel 243C2 at Georgetown in compliance with the Commission's minimum spacing requirements with a site restriction of 1.8 kilometers (1.1 miles) northwest of the city.[2] The restricted site is necessary to avoid a short spacing to Station KXGC-FM, El Campo, Texas. Additionally, the Georgetown substitution requires channel substitutions at Marlin (Channel 225A for Channel 244A) and San Saba (Channel 246A for Channel 244A), Texas. [3]

3. Since San Saba is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence has been obtained from the Mexican government.

4. In its comments, petitioner reiterates its willingness to reimburse Station KRXX(FM) for the reasonable expenses in changing to Channel 225A as required by the Commission's established policy.

5. Based on the aforementioned, we believe the public interest would be served by the substitution of Channel 244C1 for Channel 243C2 at Georgetown, Texas, providing that community with its first wide coverage area FM station.

6. We will permit Armadillo to amend its application for Channel 244A at San Saba to specify Channel 246A without loss of "cut-off" status since no upgrade in class of channel will result. *See Salamanca, New York and Bradford, Pennsylvania*, 50 FR 26208, June 25, 1985, and *Sanibel, Florida*, 50 FR 32706, August 14, 1985.

7. As requested we are modifying the license of Station KQFX(FM) to specify operation on Channel 244C1 in lieu of Channel 243C2 in accordance with Section 1.420(g) of the Commission's Rules.

8. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 9, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Georgetown, Texas	244C1, 299A
Marlin, Texas	225A
San Saba, Texas	246A

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KQFX(FM), Georgetown, Texas, IS MODIFIED, to specify operation on Channel 244C1 in lieu of Channel 243C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KRXX(FM), Marlin, Texas, IS MODIFIED, to specify operation on Channel 225A in lieu of Channel 244A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH860811KD except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH860811KD except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. Questions related to the application process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-6908.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Formerly Midwestern Broadcasting, Inc.

[2] The restricted site coordinates are 30-38-47 and 97-41-14.

[3] The coordinates are 31-19-31 and 96-54-36 at Marlin, and 31-11-40 and 98-43-08 at San Saba.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MOBILE RADIO TELEPHONE & PAGING SERVICE, INC.

File Nos. 20941-CD-P-1-83
22304-CD-ML-01-84

Forfeiture No. 63500-88-19-LD
Request for Stay of Forfeiture and Surrender of Authorization for one-way frequency 35.22 MHz for Station KRM951 in the Public Land Mobile Service at Kalamazoo, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 1988; Released: October 25, 1988

By the Chief, Mobile Services Division:

1. In December 1982, Mobile Radio Telephone & Paging Service, Inc. (Mobile) filed its application for a new one-way signaling facility on frequency 152.84 MHz at Kalamazoo, Michigan (File No. 20941-CD-P/L-01-83). In its application, Mobile included traffic loading studies for its existing paging facilities on frequencies 152.24 MHz and 35.22 MHz.[1] Mobile's traffic loading studies did not justify a second channel. Therefore, Mobile indicated in its application that, in the event its 152.84 MHz application was granted, it would relinquish frequency 35.22 MHz and transfer the existing 35.22 MHz subscribers to the 152.84 MHz channel.[2] The Mobile application was found to be mutually exclusive with the application of T-Com, Inc. (T-Com) for the frequency 154.84 MHz at Oshtemo, Michigan (File No. 20116-CD-P-83). A lottery was conducted in which Mobile was selected first. *Lottery Notice*, Mimeo No. 2814 (released February 26, 1985). By *Memorandum Opinion and Order*, Mimeo No. 4451, released May 10, 1985, the Bureau disposed of issues which T-Com raised in a petition to deny, and granted Mobile's 152.84 MHz application *in exchange* for Mobile relinquishing its license for the 35.22 MHz frequency. On February 5, 1986 an application for consent to assignment of the 152.84 MHz facility from Mobile to T-Com was filed (File No. 21830-CD-AL-1-36) and was granted on April 2, 1986 (Report No. PMS-86-27-A). Contemporaneously with the application for consent to the assignment, Mobile filed a request for relief from the requirement to surrender the authorization for 35.22 MHz. The Bureau denied Mobile's request for temporary relief and ordered Mobile to surrender the authorization for one-way frequency 35.22 MHz. *Memorandum Opinion and Order*, Mimeo No. 6538, (Comm. Carr. Bur., 1986) (*Order*).

2. On September 26, 1986, Mobile filed a Petition for Reconsideration and a Petition for Stay of the *Order*, *supra*. Mobile asked the Bureau to reinstate its 35.22 MHz authorization. Mobile argued that, as a result of its assignment of the 152.84 MHz station to T-Com, it had "no available frequency allocated exclusively for paging service to which it could transfer its approximately three hundred 35.22 MHz subscribers." It also asked the Bureau to recognize the change in the rule regarding traffic loading studies which was the basis for the surrender requirement; and, either treat the matter in the same manner as current applications, or issue a waiver of the rule. In addition, Mobile argued that the equities favor allowing Mobile to retain the 35.22 MHz authorization in view of the time lag between the Bureau's authorization of Mobile's assignment of 152.84 MHz and denial of relief from the requirement to surrender 35.22 MHz and the fact that there are a large number of alternative lowband paging channels available for application in the Kalamazoo area. On January 16, 1987 (Report No. PMS-87-18), Mobile filed a Form 401 application to re-authorize the 35.22 MHz channel. Mobilecomm of South Bend, Inc. filed for the same frequency shortly thereafter and was found to be mutually exclusive with the application of Mobile. A lottery has not yet been conducted.

3. On September 28, 1988, the Mobile Services Division issued a Notice of Apparent Liability and Surrender of License, DA 88-1460 (*NAL*) which found Mobile liable for a10,000 forfeiture for violation of the *Order*, of Section 22.3 of the Commission's rules and regulations, 47 C.F.R. Section 22.3, and of Section 312 of the Communications Act of 1934, as amended, 47 U.S.C. Section 312 and ordered Mobile to surrender its authorization for one-way frequency 35.22 MHz for Station KRM951 in Kalamazoo, Michigan. The *NAL* concluded that Mobile did not raise any new material questions of fact to support its Petition for Reconsideration, Petition for Stay or Special Temporary Authority Request. [3] On October 13, 1988, Mobile filed a Petition to Stay that portion of the *NAL* which orders Mobile to surrender its authorization for one-way frequency 35.22 MHz at Kalamazoo, Michigan. Mobile argues that it has a substantial case on the merits for reconsideration of the *NAL*, that the surrender of its 35.22 MHz authorization without a stay would cause irreparable injury because it has no other local exclusive one-way frequency to which it can transfer the approximately 150 subscribers units that presently receive service on 35.22 MHz, that there would be no substantial harm to other parties resulting from a grant of the stay because the stay would merely preserve the *status quo*, and lastly, that the public interest would be served by the grant of the stay because Mobile's subscribers need reliable paging service. For the reasons set forth below, we deny Mobile's Petition to Stay.

DISCUSSION

4. In the absence of a special order of the Commission, the filing of a petition for reconsideration or a petition for stay does not automatically stay the effect of a Commission decision. *Paxton Communicty Antenna System, Inc.*, 33 Rad. Reg. 2d (P & F) 734 (1975). Pursuant to Section 1.102(b) of the Commission's rules, the Mobile Services Division's *NAL* became effective on the day it was released. *See Committee to Save WEAM v. FCC*, 808 F.2d 113, 119 (D.C. Cir. 1986). To obtain a stay, Mobile must show (1) a likelihood that it will prevail on the merits; (2) that it will suffer irreparable injury unless the stay is granted; (3) that a stay would not harm other interested

parties; and (4) that the stay will be in the public interest. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

5. We find that Mobile has failed to meet the four part test since (1) Mobile has been ordered to surrender the authorization for one-way frequency 35.22 MHz for Station KRM 951 at Kalamazoo, Michigan in the *Memorandum Opinion and Order*, Mimeo No. 4451, released May 10, 1985, in *Memorandum Opinion and Order*, Mimeo No. 6538 (Comm. Car. Bur. 1986) and in the *NAL* released September 28, 1988, and its contentions have been rejected on all three occasions; (2) Mobile has been under Commission Order for three years to relinquish frequency 35.22 MHz, has had more than enough time to comply with the order and transfer its subscribers to another facility, has not done so, and cannot now use its own dilatory conduct to claim that complying with these orders will cause it irreparable harm;[4] (3) a stay would harm other interested parties, as Mobile is operating in violation of the Commission's rules and would further delay subscribers' transfer to an authorized system; and (4) the stay would harm the public because the public is being denied expeditious service by a duly licensed common carrier on the one-way frequency 35.22 MHz.

ORDERING CLAUSES

6. IT IS ORDERED, that the Petition for Stay filed by Mobile Radio Telephone & Paging Services, Inc., File Nos. 20941-CD-P-1-83 and 22304-CD-ML- 01-84 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] In its *Fourth Report and Order*, 56 Rad. Reg. 2d (P & F) 645, 647-8 (1984) the Commission amended Section 22.16(c) of the Rules concerning objective need standards applicable to applications for a single additional one-way channel. Section 22.16(c)(2) now provides, in pertinent part, that applications for a single additional one-way channel filed after January 1, 1986, will be acted on without reference to the loading on the applicant's existing system.

[2] At the time Mobile filed its application, Section 22.16(c) required traffic loading studies. The Mobile Services Division kept Mobile's application on file because Mobile said that it would *exchange* the 35.22 MHz frequency for the 152.84 MHz frequency, rather than add a second frequency. Based on the traffic loading study in the application, the application was defective and would have been returned accordingly.

[3] Petitioner's Request for STA, filed September 23, 1986, was filed in order for Petitioner to continue operating on the 35.22 MHz frequency until its Petition for Stay and Petition for Reconsideration were resolved. The *NAL*, released on September 28, 1988, disposed of the STA and both petitions. Therefore, Petitioner's arguments with regard to the STA are moot.

[4] Mobile states in its petition that it ceased to place new subscribers on 35.22 MHz, and allowed the number of subscriber units served to dwindle to approximately 150 by attrition. It bears noting that Mobile could have applied for a different frequency at the time that it applied for authorization to assign its 152.84 MHz frequency and relinquish its 35.22 MHz frequency, thereby avoiding service delays to its subscribers. Or, in the alternative, Mobile could have transferred its subscribers to its other authorized exclusive paging frequency which serves Kalamazoo and other markets. The fact that this would require replacement pagers and recrystallized receivers is a fact that Mobile should have taken into account before it decided to sell its 152.24 MHz facility.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-480

In re Applications of

STATE LINE BROADCASTING (hereafter State) File No. BPH-850712SF

RADIO FOUR, INC. (hereafter Radio) File No. BPH-850712SN

TEXARKANA BROADCASTING, INC. (hereafter TBI) File No. BPH-850712SO

SUSAN LUNDBORG (hereafter Lundborg) File No. BPH-850712U4

GAYLAND & SHERL GAUT (hereafter Gaut) File No. BPH-850712WA

For a Construction Permit for a
New FM Station on Channel 292A,
Texarkana, Arkansas

HEARING DESIGNATION ORDER

Adopted: September 29, 1988; Released: October 25, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *City Coverage*. Section 73.315(a) of the Commission's Rules provides that an applicant's transmitter site should be located so that on the basis of the effective radiated power and antenna height above average terrain employed, a minimum field strength of 70 dB above one uV/m (dBu), or 3.16 mV/m, will be provided over the entire principal community to be served. 47 C.F.R. § 73.315(a).

3. The engineering data submitted by all applicants acknowledges that they will not provide a 3.16 mV/m signal to the entire proposed community of license as required by Section 73.315(a) of the Commission's Rules. The applicants ask for waivers of Section 73.315(a) based on site restrictions that will not allow the transmitter to be located closer to the principal community, and the distance separation required to co-channel station KKBI, Broken Arrow, Oklahoma. However, our review discloses that the legal boundaries of the community of license as depicted by the applicants are at variance. Accordingly, it is not possible to ascertain the extent of coverage proposed. Thus, good cause has not been shown and an issue will be specified.

4. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
State	3/10/87
TBI	2/20/87
Lundborg	10/15/87; 1/12/88; 2/26/88 (eng.); 3/17/88 (eng.)
Gaut	3/2/87

5. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Gaut would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether the proposals of State, Radio, TBI, Lundborg and Gaut would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Gaut would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

APPLICANTS: State, TBI, Lundborg & Gaut.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(a) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-477

In re Applications of

IMAGE BROADCASTING, INC. (hereafter IBI) — File No. BPH-871102MB

DOUGLAS R. WHITMAN and PAMELA K. WHITMAN (hereafter Whitmans) — File No. BPH-871105MC

WAR EAGLE BROADCASTING, INC. (hereafter WEBI) — File No. BPH-871105ME

WINCO BROADCASTING, INC. (hereafter WBI) — File No. BPH-871105MH

Kenneth G. Eklund and Marshal M. Walker d/b/a EKLUND-WALKER COMMUNICATIONS (hereafter Eklund-Walker) — File No. BPH-871105MJ

FLORENE K. GRACE (hereafter Grace) — File No. BPH-871105MP

BEAVER BROADCASTING, INC. (hereafter BBI) — File No. BPH-871105MM

Jimmy Lee Jones d/b/a JONES COMMUNICATIONS (hereafter Jones) — File No. BPH-871105MN

For Construction Permit for a New FM Station on Channel 270C (101.9 MHz) Lowell, Arkansas

HEARING DESIGNATION ORDER

Adopted: September 27, 1988; Released: October 25, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. On May 31, 1988, the Whitmans filed a petition to deny the application of Eklund-Walker. The Whitman's petition to deny is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these petitions have not been considered. Accordingly, the petition will be dismissed herein and an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to 47 C.F.R. § 1.229.

3. On August 9, 1988, the Whitmans filed an "opposition to late-filed amendment." The Whitmans contend that an amendment filed by Jones on July 6, 1988 should be dismissed as untimely filed. The amendment changes the applicant from a limited partnership to an individual applicant. Although the legal form of the applicant has been changed by the amendment, no new parties have been added. The amendment removes Elvis Lee Moody, the former limited partner, from the applicant. Moody's 10% of the shares of the partnership is conveyed to Jones, the general partner of the former partnership. Jones previously held 90% of the shares and 100% of the votes. Thus, Jones still retains control. Therefore, while the amendment is untimely and Jones made no showing of good cause for acceptance of the amendment, we will accept the amendment pursuant to paragraph 15 below. Accordingly, the opposition filed by the Whitmans will be denied.

4. The engineering data submitted by Eklund-Walker does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by 47 C.F.R. § 73.315(a). The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (Feb. 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). However, an engineering study reveals that on Eklund-Walker's 70 dBu contour map the city of Lowell is shown as a small circle while in its Exhibit E-4A the city is shown to be considerably larger although the scale size is smaller. Additionally, the applicant has not shown circumstances which warrant its requested waiver of 47 C.F.R. § 73.315(a). Accordingly, an issue will be specified below.

5. A review of WBI's engineering exhibits reveals that the distances to the 60 dBu and 70 dBu contours as shown on the map (using the scale at the bottom of the contour map) do not agree with the distances shown in its Table I. For the HAAT values given by the applicant, the distances shown in V-B Question 19 are correct while those on the contour map are not. This error has no effect on the acceptability of the application which complies with all of our technical acceptance requirements, including city coverage. However, WBI will be required to submit to the presiding Administrative Law Judge, within 30 days of the release of this Order, a new contour map to correct this deficiency.

6. Our study indicates that the operation of the Jones proposal may significantly exceed the radiofrequency radiation guidelines under 47 C.F.R. § 1.1307(b). The applicant acknowledges this and proposes to build a fence 12 meters in diameter around the base of the tower. En-

gineering review of the data submitted reveals, however, that a fence 20 meters in diameter is necessary for compliance. Since the proposal of the applicant may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the applicant is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, the applicant will be required to file, within 30 days of the release of this Order, an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

7. A study indicates that Jones has specified erroneous values to the 3.16 mV/m and 1 mV/m contours in Section V-B, Item 19 for angles 180', 225', 270' and 315'. The difference between the values determined by the Commission and those supplied by the applicant is approximately 9%. This deficiency, however, does not adversely affect the applicant's city coverage requirement using either value. However, Jones will be required to provide corrected contour data, a new contour map, and new area and population data to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. IBI, WEBI, WBI and Jones have not completed Item 4 correctly: IBI gives a post office box number as the residence address for the applicant; WEBI gives a post office box number as the residence address for Betsy Pilgrim; WBI gives a post office box number for Gene and Jean Wingate; and Jones gives a post office box number as the residence address for the applicant. Accordingly, IBI, WEBI, WBI and Jones must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. Mr. Jerry W. Patton is general manager of Station KEZA(FM) in Fayetteville, Arkansas. Mr. Patton has indicated his intent to terminate his relationship with Station KEZA(FM) in the event of a grant of the referenced application. Accordingly, an appropriate condition will be specified below.

10. Mr. Douglas R. Whitman is vice president and general manager of Station KKIX(FM) in Fayetteville, Arkansas. Mr. Whitman has indicated his intent to terminate his relationship with Station KKIX(FM). Accordingly, an appropriate condition will be specified below.

11. Mr. Gene Wingate is an on the air staff person at Stations KTHS(AM) and KSCC(FM) in Berryville, Arkansas. Mr. Wingate has indicated his intent to terminate his relationship with Stations KTHS(AM) and KSCC(FM) in the event of grant of the referenced application. Accordingly, an appropriate condition will be specified below.

12. Mr. Kenneth G. Eklund is 50% general partner of Station KKIP(AM) in Lowell, Arkansas. In addition, Mr. Eklund is a 10% voting shareholder in South Central Oklahoma Broadcasting and Advertising Corporation, permittee of KBLP-FM, Lindsay, Oklahoma. Mr. Eklund has indicated his intent to terminate his relationship with Stations KKIP(AM) and KBLP-FM in the event of grant of the referenced application. Accordingly, an appropriate condition will be specified below.

13. Applicants for new broadcast stations are required by 47 C.F.R. § 73.3580 to give local notice of the filing of their applications. WBI has published the required notice, but the notice is deficient in that it fails to include the names of all the officers and directors of the corporation. To remedy this deficiency, WBI must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

14. In response to Section VI, FCC Form 301, Eklund-Walker and BBI indicate that they will each employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), they are required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rule as set forth in FCC Form 396A, the five-point Model EEO Program. However, the EEO programs submitted by Eklund-Walker and BBI are deficient. Eklund-Walker fails to identify specific sources of recruitment specializing in minority candidates. BBI fails to identify specific sources of recruitment specializing in female and minority candidates and fails to give the name of the person who has responsibility for implementation of its EEO program. Accordingly, Eklund-Walker and BBI will be required to file amended EEO programs with the presiding Administrative Law Judge within 30 days of the release of this Order.[1]

15. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE AMENDMENTS FILED
WEBI	June 13, 1988
WBI	March 11, 1988
Grace	February 17, 1988; July 6, 1988
Jones	July 6, 1988

16. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

17. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether the proposal of Eklund-Walker would provide coverage of the city sought to be served, as required by 47 C.F.R. § 73.315(a) and, if not, whether circumstances exist which warrant waiver of that Section.

2. If a final environmental impact statement is issued with respect to Jones in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

18. IT IS FURTHER ORDERED, That the petition to deny filed by the Douglas R. and Paula K. Whitman against Eklund-Walker's application IS DISMISSED.

19. IT IS FURTHER ORDERED, That the August 9, 1988 "opposition to late-filed amendment" filed by the Whitmans against Jones' July 6, 1988 amendment IS DENIED.

20. IT IS FURTHER ORDERED, That WBI shall submit the amendment requested hereinabove in paragraph 5 to the presiding Administrative Law Judge within 30 days of the release of this Order.

21. IT IS FURTHER ORDERED, That in accordance with paragraph 6 hereinabove, Jones shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

22. IT IS FURTHER ORDERED, That Jones shall submit the amendment requested hereinabove in paragraph 7 to the presiding Administrative Law Judge within 30 days of the release of this Order.

23. IT IS FURTHER ORDERED, That, pursuant to paragraph 8 hereinabove, IBI, WEBI, WBI and Jones shall submit amendments which contain the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

24. IT IS FURTHER ORDERED, That, in the event of grant of IBI's application, Mr. Jerry W. Patton will be ordered to divest himself of all interests in and sever all connections with Station KEZA(FM),Fayetteville, Arkansas, prior to the commencement of program test authority.

25. IT IS FURTHER ORDERED, That, in the event of grant of Whitmans' application, Mr. Douglas R. Whitman will be ordered to divest himself of all interests in and sever all connections with Station KKIX(FM),Fayetteville, Arkansas, prior to the commencement of program test authority.

26. IT IS FURTHER ORDERED, That, in the event of WBI's application, Mr. Gene Wingate will be ordered to divest himself of all interests in and sever all connections with Stations KTHS(AM) and KSCC(FM), Berryville, Arkansas prior to the commencement of program test authority.

27. IT IS FURTHER ORDERED, That, in the event of grant of Eklund-Walker's application, Mr. Kenneth G. Eklund will be ordered to divest himself of all interests in and sever all connections with Stations KKIP(AM), Lowell, Arkansas, and KBLP(FM), Lindsay, Oklahoma, prior to the commencement of program test authority.

28. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished: WBI.

29. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Eklund-Walker and BBI shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

30. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by WEBI, WBI, Grace, and Jones ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

31. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

32. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

33. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] In the event that an applicant listed an organization in its EEO program as a recruitment source which is unfamiliar to the staff but which would satisfy our EEO requirements, the applicant may amend its EEO program to describe that organization.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-479

In re Applications of

RA-AD OF TRENTON, INC. (hereafter RA-AD) File No. BPH-870917MD

TRENTON SERVICE CO., INC. (hereafter Trenton) File No. BPH-870918MV

For Construction Permit
for a New FM Station on
Channel 274A in Trenton, Georgia

HEARING DESIGNATION ORDER

Adopted: September 27, 1988; Released: October 25, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. RA-AD is the licensee of station WADX(AM) in Trenton, Georgia. RA-AD has indicated its intent to terminate its relationship with station WADX(AM) in the event of grant of the referenced application. Accordingly, in the event of grant of RA-AD's application, RA-AD will be required to sever all connections with station WADX(AM) prior to the commencement of program test authority. In addition, RA-AD has indicated its intention to seek enhanced credit based upon the Commission's AM daytimer preference policy.

3. *Other Matters*. In the *Report and Order* in MM Docket No. 85-317, 1 FCC Rcd 60 (1986), the Commission allocated Channel 274A to Trenton, Georgia as a first FM service. This allotment met the minimum distance separation requirements. However, it was contingent upon station WYCQ-FM, Channel 275, Shelbyville, Tennessee, receiving a license to operate as a Class C1 facility. On March 26, 1986, Tenncom, Ltd., licensee of station WYCQ-FM, filed an application requesting the downgrade of its facility (BPH-860326ID). This application was granted on July 29, 1987, and the expiration date of the construction permit is January 29, 1989. The Report and Order stated that the filing window dates for Channel 274A would be announced at a future date to follow the licensing of station WYCQ-FM. Since station WYCQ-FM has until January 29, 1989 to complete construction of this downgrade of its facility, it appears that the window for allocation of Channel 274A to Trenton, Georgia was opened prematurely. Accordingly, any grant in this proceeding is contingent upon station WYCQ-FM receiving a license to operate as a Class C1 facility.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That, in the event of grant of its application, RA-AD will be ordered to divest itself of all interests in and sever all connections with Station WADX-AM in Trenton, Georgia prior to the commencement of program test authority.

7. IT IS FURTHER ORDERED, That a grant of the construction permit in this proceeding is contingent upon station WYCQ-FM, Channel, 275, Shelbyville, Tennessee, receiving a license to operate as a Class C1 facility.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-478

In re Applications of

DENNIS N. O'NEAL (hereafter Neal) File No. BPH-870914MA

M CORPS, INC. (hereafter Corps) File No. BPH-870914MQ

For Construction Permit for
a New FM Station in Laurel, Delaware
Channel No. 237A (95.3 MHz)

HEARING DESIGNATION ORDER

Adopted: September 28, 1988; Released: October 25, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Corps.* Keith A. Mayo, President, Director and 50% stockholder of the applicant, is also Vice President, Director and 25% stockholder of Apex Associates, Inc. (Apex), permittee of WAAI(FM), Hurlock, Maryland. In the event of grant of Corps' application, Keith A. Mayo promises to divest his interest in Apex. Accordingly, an appropriate condition will be ordered.

3. *Other Matters.* Corps petitioned for leave to amend its application on December 17, 1987 and January 21, 1988. The accompanying amendments were filed after November 23, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Neal and Corps would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Neal and Corps would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHERED ORDERED, That in the event of grant of Corps' application, Keith A. Mayo will be required to divest himself of all interest in and sever all connections with station WAAI(FM) (Hurlock, Maryland) prior to the commencement of program test authority.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Corps IS GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-507

In the Matter of

Amendment of the Maritime Services Rules (Part 80) to restrict the frequency selection capability of VHF transmitters to maritime frequencies.

NOTICE OF PROPOSED RULE MAKING

Adopted: October 13, 1988; Released: October 25, 1988

By the Commission:

I. INTRODUCTION

1. This *Notice of Proposed Rule Making* (*Notice*) proposes to amend Part 80 of our Rules to restrict the frequency selection capability of VHF maritime radio station transmitters (VHF maritime transmitters) to maritime frequencies. This action would prevent intentional or inadvertent harmful interference to stations operating on channels in other radio services. The proposed rules would phase out VHF maritime transmitters with indiscriminate frequency programming[1] capabilities by precluding the manufacture, sale and installation of such equipment over a two year period while "grandfathering" the use of equipment installed prior to the established cutoff date.

II. BACKGROUND

2. A number of the VHF transmitters now being manufactured for maritime stations are capable of operating on many frequencies in addition to the maritime frequencies for which they can be licensed.[2] While some transmitters may be delivered from the factory with this capability, others require a simple field modification to allow access to the channels. Prior to the development of frequency synthesizers, VHF maritime transmitters were pre-tuned so that their external controls could select only those frequencies for which they were licensed to operate. Pre-tuning these transmitters properly was recognized as a technical task. It generally required that the transmitter housing be opened, that special crystals be installed to control the accuracy of the pre-tuned frequencies, and that internal circuits be adjusted. The same procedure was followed to change a pre-tuned frequency. Misadjustment of the internal circuits could cause the transmitter to operate improperly and cause harmful interference to the radio communications of other stations. Accordingly, our Rules have required that all adjustments of radio transmitters in any radiotelephone station which may affect the proper operation of the station be performed by or under the supervision of a person holding a first or second class radiotelegraph operator's certificate or a general radiotelephone operator's license.[3] Maritime station operators did not, therefore, have any ability to operate on any frequencies other than those pre-tuned frequencies in their transmitters. As a result, they operated their VHF stations only on the authorized maritime frequencies.

3. Many of the VHF maritime transmitters now being manufactured, however, employ frequency synthesizers that can be programmed by a station operator to select any transmission frequency consistent with the design of the transmitter, including frequencies that are used in other radio services. The availability of these transmitters enables maritime station operators, many of whom have little communications background or experience, to select and operate on frequencies used by other radio services. As a result, there has been an increase in harmful interference caused by operation of maritime stations on unauthorized frequencies. For example, we have received numerous complaints in the Gulf of Mexico area regarding harmful interference caused by maritime radio station licensees operating on VHF frequencies assigned for use by the land mobile radio services. *See, e.g.*, letter from James C. Hawkins, Engineer in Charge, New Orleans, Lousiana, Field Operations Bureau, Federal Communications Commission, to Ralph A. Haller, Chief, Private Radio Bureau, Federal Communications Commission (February 3, 1988).

4. In a previous proceeding, PR Docket No. 86-37,[4] we adopted certain rules that restrict the manufacture and use of transmitters in the private land mobile services that permit indiscriminate frequency programming by station operators. Those rules were developed using suggestions contained in the comments filed by the Land Mobile Section of the Electronic Industries Association (EIA). EIA also suggested that we adopt similar restrictions for maritime transmitters. Comments of Electronic Industries Association in PR Docket No. 86-37, filed July 6, 1987, at 3.

III. PROPOSAL

5. We propose to amend Section 80.203 of our Rules to deny type acceptance for and phase out the use of maritime VHF transmitters that permit frequency programming by station operators. The proposed rules are similar to those adopted for land mobile transmitters in PR Docket No. 86-37, *supra*. The intent of the proposed rules is to inhibit operation of maritime VHF transmitters on unauthorized frequencies. We emphasize that it is not the intent of this proposal to forbid the use of VHF transmitters that employ frequency synthesizer techniques when such transmitters are capable of front panel selection of pre-programmed maritime VHF frequencies.

6. We are proposing that frequency synthesized VHF maritime transmitters (a) manufactured in or imported into the United States one year after the release of a Report and Order in this proceeding, and (b) sold or installed in maritime stations two years after the release of a Report and Order in this proceeding must not be capable of frequency programming by station operators. These phase out periods should provide sufficient time for manufacturers to respond to equipment modifications and for dealers to clear their inventories. We are proposing that such transmitters installed within two years after the release of a Report and Order in this proceeding be "grandfathered" for use indefinitely while located at the same maritime station. We request comments, however,

regarding the proposed phase out time periods. Further, we request comments concerning whether the benefits derived from this proposal justify any additional manufacturing costs that may be incurred.

7. We recognize that ships on domestic voyages communicating with United States radio stations are expected to use channelization plans contained in the Commission's Rules while ships on international voyages communicating with foreign radio stations are expected to use channelization plans contained in the international Radio Regulations. The international Radio Regulations allow ships to use a number of frequencies in addition to the ones contained in the Commission's Rules.[5] The proposed rules were developed with this in mind. As before, we intend to allow VHF maritime transmitters to be capable of operating on international as well as domestic maritime frequencies.

IV. INITIAL REGULATORY FLEXIBILITY ANALYSIS

8. Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), our initial analysis is as follows:

Reason For Action

9. This action is being taken to incorporate into the Commission's Rules a restriction against the manufacturing of VHF maritime transmitters with frequency programming capabilities that could permit operation on unauthorized frequencies. The use of such units by those who would willfully or inadvertently program, select and use unauthorized frequencies has the likely potential of degrading operations in the maritime mobile and other radio services to the detriment of the public as a whole.

Objectives

10. The proposed action would make it more difficult to transmit on unauthorized frequencies, thus minimizing intentional or unintentional interference to authorized operations.

Legal Basis

11. The proposed action is authorized under Sections 4(i), 303(f) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f) and (r).

Reporting, Recordkeeping And Other Compliance Requirements

12. VHF maritime radio station transmitters with certain frequency programming capabilities would be phased out according to the following schedule; this equipment could no longer be manufactured or imported after one year from the date of a final order in this proceeding and it could no longer be installed after two years from the date of a final order in this proceeding. Such transmitters installed within two years from the date of a final order in this proceeding would be "grandfathered" for use indefinitely at the same maritime station. Transmitters meeting the new requirements would require type acceptance actions.

Federal Rules Which Overlap, Duplicate, Or Conflict With This Rule

13. None.

Description, Potential Impact, And Number Of Small Entities Involved

14. The greatest initial impact of the proposed rules will be on equipment manufacturers. As the proposed rules are based upon comments of the EIA with concurrence of equipment manufacturers, it would appear that equipment manufacturers generally support the proposal. We estimate the number of manufacturers affected to be small. Additionally, we believe the equipment phase out periods will provide sufficient time for manufacturers, dealers and consumers to respond in such a manner that any adverse impact will be minimized.

Any Significant Alternatives Minimizing The Impact On Small Entities And Existing Licensees And Consistent With The Stated Objective

15. *See* paragraph 6 above concerning the length of the proposed phase out periods. This *Notice* specifically requests comments regarding the time proposed to phase out manufacturer, installation, and use of this equipment.

V. CONCLUSION

16. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolutions of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

17. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See* 47 C.F.R. § 1.1206.

18. Authority for issuance of this *Notice* is contained in Sections 4(i), 303(f) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f) and (r).

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules (47 C.F.R. §§ 1.415 and 1.419) interested parties may file comments on or before **February 24, 1989,** and reply comments on or before **March 31, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

19. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease the burden hours imposed on the public.

20. A copy of this *Notice* shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Proposed Rules

Part 80 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. In Section 80.203 paragraphs (b), (c), (d), (e), (f), (g), (h), (i) and (j) are redesignated (c), (d), (e), (f), (g), (h), (i), (j) and (k) respectively and a new paragraph (b) is added to read as follows:

§ 80.203 Authorization of transmitters for licensing.

* * * * *

(b) The external controls of VHF maritime station transmitters that are capable of operation in the 156-162 MHz band and are manufactured in or imported into the United States (one year after release of a Report and Order in this proceeding), or sold or installed (two years after release of a Report and Order in this proceeding) must be able to select only pre-programmed maritime frequencies and such transmitters must not be programmable by maritime station operators. The procedures and special devices for programming must only be made available to licensed service and maintenance personnel and must not be made available with the information normally provided to consumers. Transmitters capable of being programmed by maritime station operators by means of external controls that are installed in a maritime station by (two years after release of a Report and Order in this proceeding) are authorized for use indefinitely at the same maritime station. Furthermore, the programming of frequencies must be limited to those frequencies contained in this Part of the rules or Appendix 18 of the international Radio Regulations and must be performed only by a person holding a first or second class radiotelegraph operator's certificate or a general radiotelephone operator's license using any of the following procedures:

(1) Internal adjustment of the transmitter;

(2) Use of controls normally inaccessible to the station operator;

(3) Use of external devices or equipment modules made available to service and maintenance personnel only; and

(4) Copying of a frequency selection program directly from another transmitter (cloning) using devices and procedures made available to service and maintenance personnel only.

* * * * *

FOOTNOTES

[1] For the purpose of this proceeding the term "programming" applies to maritime transmitters employingfrequency synthesizers to select certain predetermined codes, using key pads, thumbwheels, or similar means, to change the operating frequencies that can be selected using the transmitter's externalcontrols.

[2] VHF maritime transmitters operate in the 156-162 MHz band and many such transmitters are now capable of being programmed to operate on frequencies as much as 1 MHz outside the band.

[3] 47 C.F.R. § 80.169(a).

[4] Amendment of Part 90 of the Commission's Rules to Restrict the Use of Radio Transmitters with External Frequency Controls, PR Docket No. 86-37, 2 FCC Rcd 7221 (1987).

[5] *See* 47 C.F.R. §§ 80.371(c) and 80.373(f), and Appendix 18 of the international RadioRegulations.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RKO GENERAL, INC. (KHJ-TV) Los Angeles, California	**DOCKET NO. 16679** File No. BRCT-58
For renewal of Broadcast License	
FIDELITY TELEVISION, INC. Norwalk, California	**DOCKET NO. 16680** File No. BPCT-3655
For Construction Permit for New Television Broadcast Station	
WILLIAM G. SIMON *et al.* Transferors	
and	File No. BTCCT-870420KL
THE WALT DISNEY COMPANY Transferee	
For Consent to Transfer of Control of License for and Related Applications	File Nos. BPCT-870420KJ, KHJ-TV BLCT-870420KH, BLCT-870420KI

ORDER

Adopted: October 31, 1988; Released: November 2, 1988

By the Commission: Commissioner Dennis dissenting and issuing statement.

1. The Commission has before it: (1) a Petition to Set Aside Erratum filed September 9, 1988 by Los Angeles Television, California Limited Partnership (LATV); and (2) a Response of The Walt Disney Company filed September 16, 1988. These pleadings relate to a memorandum opinion and order by which the Commission approved a settlement agreement involving the transfer of station KHJ-TV in Los Angeles to The Walt Disney Company. *RKO General, Inc. (KHJ - TV),* FCC 88-253 (Aug. 19, 1988), 3 FCC Rcd 5057 (1988). In so doing, the Commission rejected LATV's argument that it should be permitted to file an application for a construction permit mutually exclusive with RKO General, Inc.'s renewal application for KHJ-TV. 3 FCC Rcd at 5064 ¶¶ 48-49.

2. In this regard, footnote 26 of the memorandum opinion and order originally read as follows:

> We note that LATV will have an opportunity to apply for this frequency when the license term for California TV stations expires, which will occur on December 1, 1988. 47 C.F.R. § 73.1020.

3. On September 6, 1988, the Commission issued an erratum correcting this footnote to read:

> We note that LATV will have an opportunity to apply for this frequency when the license term for California TV stations next expires after termination of this hearing proceeding. 47 U.S.C. § 307(c); 47 C.F.R. §§ 73.1020, 73.3516(e), 73.3539(a).

RKO General, Inc. (KHJ - TV), FCC 88-298 (Sept. 6, 1988).

4. The Commission made this correction because it observed that LATV would not necessarily have an opportunity to apply for this frequency in conjunction with the license term ending December 1, 1988. We noted that although that would be true if the parties consummated the settlement agreement before December 1. 1988, under the terms of the settlement agreement Disney is not obligated to close prior to December 15, 1988. Agreement for Settlement, Acquisition and Merger § 10.1(i). The Commission found that it is apparently the parties' expectation that they would close on or about December 15, 1988. *See* Letter from Richard E. Wiley (counsel for The Walt Disney Company) to H. Walker Feaster, III, Acting Secretary, FCC (Aug. 26, 1988).

5. LATV contends that the Commission's erratum violates FCC policies relating to assignments and that it violates LATV's procedural rights. (LATV refers to arguments made in an earlier pleading entitled Opposition to Petition for Reconsideration of the Walt Disney Company filed September 8, 1988.) LATV points out that the Commission form used to approve routine assignments and transfers of control (Form 732) provides that an assignment or transfer of control shall be consummated within 60 days of approval. Thus, LATV argues that the Commission should not permit the parties to the settlement agreement here to delay consummation of the transfer of KHJ-TV for a longer period of time.

6. LATV further contends that by permitting the parties to delay consummation until after December 1, 1988, the Commission abrogates LATV's right to file an application during the license term ending on that date and delays LATV's right to file until the license term ending December 1, 1993. According to LATV, the Commission did not intend to insulate KHJ-TV from comparative challenge for five additional years and that to do so would be contrary to the public interest.

7. We find that LATV's arguments are without merit. Under well-established Commission policy, a licensee is not required to file renewal applications while it is in hearing status, and, therefore, mutually exclusive applicants may not file against a licensee in hearing. *See Faith Center, Inc.*, 99 FCC 2d 1164, 1168 ¶ 7 (1984), reaff'd after remand, 3 FCC Rcd 868 (1988). This represents an exception to the normal rule that licensees must file for renewal at the end of each license term specified in 47 C.F.R. § 73.1020(a), at which time competing applicants may file mutually exclusive applications. 47 C.F.R. § 73.3516(e), 73.3539(a). KHJ-TV has been in hearing status

for over 23 years. Consequently, RKO, the licensee of KHJ-TV during that time, has not been required to file renewal applications, and neither LATV nor anyone else has been permitted to file for KHJ-TV's frequency. *See City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 662-64 (D.C. Cir. 1984).

8. When the Commission approved the settlement agreement here, we provided that this proceeding would remain in hearing status until the parties notified the Commission that they had consummated the transactions specified in their agreement. 3 FCC Rcd at 5066 n.30. That agreement on its face provided that the parties have the discretion to close after December 1, 1988. The Commission's action thereby gave the parties the ability to foreclose the filing of mutually exclusive applications, and the Commission's erratum merely made this more explicit.

9. The Commission had ample public interest reasons for taking this approach. In approving the settlement, we found that the public interest strongly favored the expeditious resolution of this proceeding -- which threatened to continue for many years to come -- so that RKO can withdraw as a licensee and an unquestionably qualified licensee able to devote its full resources to broadcasting can take over without a cloud of uncertainty hanging over its head. *See* especially 3 FCC Rcd at 5059-60 ¶¶ 16-22. We also found that this public interest goal would be frustrated if the proceeding were opened up to potentially numerous competing applications by LATV and others -- which could necessitate a further prolonged comparative renewal proceeding. *Id.* at ¶ 49.[1] We therefore had strong public interest reasons not to "open the window" to LATV and others.

10. However, we were also fully aware that under the Communications Act a licensee is not protected from challenge indefinitely. Hence, we observed in footnote 26 that LATV would have an opportunity to seek KHJ-TV's frequency at a future time. LATV could then attempt to show that allowing it to replace Disney as the licensee of KHJ-TV would better serve the public interest. In our view, this factor sufficiently protects the public against any possible detrimental impact of the settlement and gives adequate protection to LATV's procedural rights. *Cf. Multi - State Communications, Inc. v. FCC*, 728 F.2d 1519, 1526 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 431 (1984) (noting that congressional action that terminated a comparative renewal proceeding did not permanently bar the competing applicant from seeking the broadcast facility, because the applicant could reapply at the end of the next license term).

11. LATV has not rebutted these strong public interest considerations. LATV instead attempts to rely on an alleged Commission policy of requiring all transfers of stations to be consummated within 60 days. We have no such policy. Although in routine transfers, consummation is typically required within 60 days (as indicated by Form 732), this period is routinely varied to fit the specific circumstances of the case. For example, as Disney notes, there have been cases (in which a transfer might otherwise have been consummated at the very end of a license term) where consummation has been deferred until the beginning of the new license term. *See*, for example, Letter from Roy J. Stewart, Chief, Video Services Division, Mass Media Bureau to John C. Quale (Aug. 20, 1987) (regarding the transfer of control of Storer Communications, Inc.). Thus, our action in this proceeding is fully consistent with our past practice.

12. ACCORDINGLY, IT IS ORDERED, That the Petition to Set Aside Erratum filed September 9, 1987 by Los Angeles Television, California Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] We explained that we probably could not open the proceeding to LATV alone.

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Petition to Set Aside Erratum in the Los Angeles, California Television Comparative Renewal Proceeding, (Docket Nos. 16679-80).

I dissent, for two reasons.

First, this decision--by further prolonging the RKO hearing--undermines the majority's rationale for approving the underlying KHJ settlement in the first place. *Memorandum Opinion and Order*, 3 FCC Rcd 5057 (1988). In that decision, the majority abandoned settled Commission policy so as to end the KHJ hearing and place the license in the hands of The Walt Disney Company, an unquestionably qualified licensee. Rather than carry the hearing to its conclusion, the majority decided there was an overwhelming public interest in short-circuiting the hearing process and transferring the license quickly from RKO to Disney. 3 FCC Rcd at 5059.

I dissented from that decision, but even accepting the majority's reasoning in that case, I must dissent here. The Commission issued its *Memorandum Opinion and Order* approving the KHJ settlement on August 19. Normally, we require transfers to be closed within sixty days after approval. If it were so vital to remove the cloud overhanging KHJ, then Disney should have been required to close in *less* than 60 days, not more. If time were of the essence then, how is it any different now? How can the majority vote to keep KHJ in hearing status for yet another month, without even acknowledging the public interest in having a fully qualified licensee replace RKO?

Second, there is the *Ashbacker* issue. Under the Communications Act, we are obligated to accept competing applications whenever a renewal application is filed. The Act contemplates public participation--through petitions to deny and competing applications--as a vital part of the licensing process.

With respect to KHJ, this public process has been suspended since 1965, because of the extended litigation involving RKO. Other than Fidelity, no member of the public has been allowed to apply for Channel 9 for 23 years. Under the majority's decision of August 19, the KHJ hearing could not be concluded, the sale to Disney

could be closed, and the normal statutory process could resume on December 1, when applications for all California stations are due. By requiring Disney to close promptly and file its own renewal application, we could once again permit the public to participate in the licensing of Channel 9.

Obviously, it would be more convenient for Disney not to file a renewal application. It would also be more convenient for the Commission to avoid starting a new KHJ hearing just as the old one is completed. The majority's argument proves too much, however. It is no more or less convenient for Disney to avoid competing applications than it is for any other licensee. The majority's exception swallows the rule and, in this case, the statute. Under the Communications Act, we have no choice but to order consummation of the settlement and resumption of the normal statutory process.

The comparative renewal process can be unwieldy, unproductive, and seemingly interminable. I share the majority's misgivings about the process--and I suspect that those misgivings motivate today's decision. But the way to reform the hearing process is through our outstanding rulemaking proceeding or through Congressional action. Until our policies are changes, we should enforce them consistently and evenhandedly. We should not make special exceptions as the majority unfortunately did in August and does again here.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

LENORA B. FULANI

Against

ABC, CBS, NBC, FOX, and
CABLE NEWS NETWORK

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 1988; Released: November 1, 1988

By the Commission:

1. The Commission has before it a complaint filed October 18, 1988, on behalf of Presidential candidate Lenora B. Fulani, alleging violation of the "equal opportunities" provision of Section 315(a) of the Communications Act (47 U.S.C. 315(a)). The complaint is directed at the ABC, CBS, NBC, and Fox Broadcasting television networks, and the Cable News Network (CNN), in connection with their coverage of the October 13, 1988, presidential debate.[1] 33mplainant asserts that the debate was not a bona fide news event and, as such, did not qualify as exempt news programming under the "on-the-spot coverage of a bona fide news event" exemption found at Section 315(a)(4) of the Communications Act. Complainant also argues that a general absence of coverage of the Fulani candidacy supports a claim of bad faith on the networks' part and is otherwise in violation of the fairness doctrine.

2. The complainant grounds her complaint on: (1) control of the debate by the major party candidates, Governor Michael Dukakis and Vice President George Bush, through the auspices of the Commission on Presidential Debates (CPD), a bipartisan organization established by the Chairmen of the Democratic and Republican parties to handle debates during the 1988 Presidential election; and (2) coverage of the debates by the above-listed networks which, in complainant's view, "have in bad faith shaped their coverage of the 1988 presidential election (including the broadcast of the debate) to favor the candidates of the Democratic and Republican Parties and to deprive American voters of the knowledge that there is a third national candidate."

DISCUSSION

3. Section 315 of the Communications Act of 1934 provides that if a broadcaster or cable operator (community antenna television system) permits a legally qualified candidate for public office to use its facilities, equal opportunities to use the facilities must be afforded to all other candidates for that office. In 1959, however, Congress amended Section 315 to exempt four categories of news programming from this requirement:

> (1) bona fide newscast;
>
> (2) bona fide news interview;
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto). [47 U.S.C. Section 315(a)]

4. In 1975, the Commission overturned several 1962 decisions and ruled that debates sponsored by nonbroadcast entities were exempt under Section 315(a)(4) as "on-the-spot coverage of bona fide news events." *Aspen Institute*, 55 FCC 2d 697 (1975), *aff'd sub nom. Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976). In 1983, the Commission extended the exemption further to include broadcaster-sponsored debates. *Henry Geller*, 95 FCC 2d 1236 (1983), *aff'd sub nom. League of Women Voters v. FCC*, 731 F.2d 995 (1983).

5. In 1987, during the presidential primaries, the Commission, through its Mass Media Bureau, declared that a New Hampshire debate, "sponsored by and controlled by the two sole participants," Governor Dukakis and Congressman Richard A. Gephardt, could be treated as exempt "on-the-spot coverage of a bona fide news event." *WCVB - TV*, 2 FCC Rcd 4778 (M.M.Bur. 1987). This decision stated that "[s]uch an event may be newsworthy regardless of who initiates it - including the candidates themselves." In reaching this determination, the decision cited *Henry Geller*, *supra*, for the proposition that irrespective of the sponsoring parties "[the] common denominator of all exempt programming is bona fide news value." Regarding the potential for abuse in deferring so strongly to a broadcaster's judgment in allowing candidate-sponsored debates, it was emphasized that:

> With respect to political favoritism by broadcasters, Congress knowingly faced that risk and opted in favor of broader coverage and increased broadcaster discretion based on bona fide news judgment. *See Chisholm*, *supra*, at 366. In this setting, the risk is no greater than that of a broadcaster-sponsored debate. Neither event reposes unbridled power in a single candidate to advance his/her candidacy. Indeed, the adversarial nature of the debate format reduces greatly the chance of any broadcaster favoritism. *Cf. WANV*, 68 FCC 2d 1616 (B/c Bur. 1978).

WCVB - TV, *supra* at 4778.

6. Here, the fact that an organization established through the cooperation of the major political parties sponsored the debate is similarly not determinative of the bona fide newsworthiness of the debate. In short, regardless of the debate's sponsors, format, or participants, the controlling question is whether broadcasters made good faith journalistic determinations that the October 13 debate was newsworthy. It is the broadcaster, not the Commission, who bears the initial responsibility to formulate journalistic judgments as to whether, as the Commission reasoned in *Henry Geller*, an event has "bona fide news value." Despite complainant's speculation that the broad-

casters acted in bad faith, the complaint contains nothing more than bare allegations that the coverage of the October 13 debate was motivated by bad faith rather than the requisite good faith intent to air what was perceived as a bona fide news event. We thus have no reason to doubt the good faith of the journalistic judgments made here and have no basis for finding a violation of Section 315.

7. Moreover, a general lack of news coverage of Fulani's candidacy is without relevance except to demonstrate the apparent judgment by various broadcasters and other news organizations that Fulani's candidacy is not sufficiently newsworthy to merit greater attention. This lack of coverage does not raise a fairness doctrine problem. In *Syracuse Peace Council v. WTVH (TV)*, 2 FCC Rcd 5043 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), appeal pending, *(Syracuse)*, the Commission eliminated the fairness doctrine after determining that it was unconstitutional and contrary to the public interest. We find no basis on which to conclude that *Syracuse* does not control resolution of Fulani's alleged fairness complaint. Notwithstanding the fact that she is a candidate, Fulani's complaint in this regard is, in essence, a general fairness complaint.[2]

8. In view of the foregoing discussion Commission action is unwarranted. Accordingly, the complaint of Lenora Fulani IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In light of our decision herein, that no *prima facie* showing of a violation has been set forth, no responsive pleadings have been required of any of the parties to whom the complaint was directed and we need not address any issues concerning the propriety of directly addressing the requirements of Section 315 to all of them.

[2] However, even assuming the continued applicability of the doctrine to matters of this type, no different resolution of this complaint would be warranted. Where a program deals specifically with the question of why a particular candidate should or should not be elected, the controversial issue of public importance presented is who, among all the candidates, should be elected. Each candidate constitutes a separate "view" on this issue. Under the doctrine, broadcasters needed only to present significant contrasting views on controversial issues of public importance. Thus, they had the discretion to present on a program those candidates whom they considered significant. The broadcasters were permitted to give less coverage or no coverage to those candidates whom they deemed less significant in the exercise of their good faith, reasonable judgment. *American Independent Party*, 62 FCC 2d 4 (1976); *U.* S.L aborP arty, 57 FCC 2d 1273 (B/c Bur. 1976). Thus, even if the fairness doctrine were applicable, no showing has been made that the requisite standard would have been violated.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 18, 1988

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AMENDMENT TO BELL ATLANTIC'S PLAN TO OFFER COMPARABLY EFFICIENT INTERCONNECTION FOR A GATEWAY SERVICE

On October 11, 1988, the Bell Atlantic telephone companies (Bell Atlantic) filed an amendment to its comparably efficient interconnection (CEI) plan to provide enhanced gateway, electronic mail, and computer storage services, originally filed on March 30, 1988. The Commission approved Bell Atlantic's CEI plan for gateway service, but it disapproved the proposals for electronic mail and computer storage services because Bell Atlantic's plan for these services was incomplete (Memorandum Opinion and Order, DA 88-1512, released Sept. 30, 1988). Bell Altantic states that the amendment to its CEI plan will provide greater specificity about the aspects of the plans that the Commission disapproved.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration, 2 FCC Rcd 3035 (1987), further reconsideration,* 3 FCC Rcd 1135 (1988)), the Commission must approve the amendment before Bell Atlantic can begin implementing the proposed services. Bell Atlantic believes that the amendment sufficiently details its proposed services and supplements the record. Therefore, Bell Atlantic requests that the Commission approve the amendment expeditiously in order for it to be able to offer a comprehensive gateway service.

Interested parties should file comments on this amendment by **November 4, 1988,** and reply comments by **November 14, 1988,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Bell Altantic's amendment plan can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

TRIBUNE BROADCASTING COMPANY, 8330-SM C8-537

For Declaratory Ruling

STAFF RULING

Adopted: October 17, 1988; Released: October 17, 1988

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a request for a declaratory ruling filed August 25, 1988, by Tribune Broadcasting Company (Tribune), seeking a Commission determination that its "Geraldo" program is a "bona fide news interview" program, exempt from the "equal opportunities" provision of Section 315(a) of the Communications Act of 1934, as amended.

2. Through wholly-owned subsidiaries, Tribune owns and operates six television and five radio stations, including WGN-TV, Chicago, Illinois, which has telecast the "Geraldo" series since its inception. Another subsidiary, Tribune Entertainment Company, produces and distributes the nationally-syndicated "Geraldo" series in conjunction with The Investigative News Group, Inc., a firm controlled by Geraldo Rivera.

3. Tribune contends that "Geraldo" satisfies the criteria the Commission requires for a "bona fide news interview" exemption under Section 315(a)(2). According to Tribune, "Geraldo" is a one-hour, issue-oriented interview program which has been regularly scheduled on a Monday-through-Friday basis since September 7, 1987. It is videotaped before a studio audience and is hosted by broadcast journalist Geraldo Rivera. Tribune also asserts that the program is under the control of an FCC licensee. Specifically, Tribune and its wholly-owned Tribune Entertainment Company subsidiary are integrally involved in program production. Both are consulted regarding the specific topics and guests for each program. They frequently have representatives present in the studio during program tapings to participate in "pre-production meetings" and production decisions. Tribune further emphasizes that it retains final editorial approval of the subject matter, script and execution of each pre-recorded "Geraldo" program. "In the exercise of its editorial approval rights, Tribune has (and exercises) the right to screen all programs for content prior to broadcast, including approval of all programs for compliance with Tribune's broadcast and legal standards and practices." Additionally, Tribune states that all decisions on the format, content, and participants of "Geraldo" are based on its exercise of bona fide news judgment, rather than a desire to advance any individual's candidacy.

4. Finally, Tribune maintains that the "Geraldo" program meets the criteria cited by the Commission in granting the Section 315(a)(2) exemption for the "Donahue" program in *Multimedia Entertainment, Inc.*, 56 RR 2d 143 (1984). As was found with regard to the "Donahue" program, Tribune has well established procedures designed to ensure that it retains journalistic control over the format of the program despite audience participation. Before each program, the audience is informed of the specific topic to be discussed and the rules for participation, including the prohibition against speechmaking and extended remarks. While seats are occasionally reserved for guests invited specifically for their insights into the issue being discussed, and members of the audience are allowed to question the guests, Mr. Rivera retains the requisite control. He selects the questioners, holds the microphone, and restates the question if necessary to focus upon what the production staff, in consultation with Tribune, has determined is the appropriate journalistic approach to the particular subject matter.

DISCUSSION

5. Section 315 of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to "use" a broadcast station (an appearance by picture or voice), it must afford equal opportunities to other such candidates for that office. In 1959, Congress, in an effort to encourage increased news coverage of political campaign activity, amended Section 315 to exempt from equal opportunities appearances by legally qualified candidates on the following news programs:

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide new documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a). In determining whether a program qualifies as a "bona fide news interview," the Commission considers the following factors:

> (1) whether it is regularly scheduled; (2) whether the broadcaster controls the program; and (3) whether the broadcaster's decisions on the format, content and participants are based on its reasonable, good faith journalistic judgment and newsworthiness rather than on an intention to advance any individual's candidacy. *See U. S. News and World Report, L. P.*, 2 FCC Rcd 7101 (1987).

6. Based on the information contained in Tribune's request, it appears that "Geraldo" is exempt from equal opportunities as a bona fide news interview program under Section 315(a)(2). The program has been regularly scheduled to air since September 7, 1987. *See Aspen Institute*, 55 FCC 2d 697, 709 (1975). Tribune represents that it and its wholly-owned Tribune Entertainment Company subsidiary are integrally involved in the production pro-

cess. While "Geraldo" is co-produced with a non-licensee entity, Tribune's final editorial approval rights over each pre-recorded program ensures the type of control required by Congress. *See U. S. News and World Report, L.P., supra;* Media and Society Seminars, 56 RR 2d 1150 (M. Med. Bur. 1984). Moreover, according to Tribune, all decisions as to format, editing, content and participants are based on its good faith journalistic judgment and newsworthiness, and are not intended to advance any individual's candidacy.

7. In view of the foregoing, it appears that "Geraldo" should be classified as a bona fide news interview program. Accordingly, appearances by legally qualified candidates for public office will be exempt from the equal opportunities requirement of Section 315.

8. Staff action is taken here pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

LORIMAR	File Numbers: BTCCT-880621KJ
TELEPICTURES	BTCCT-880621KK
CORPORATION	BTCCT-880621KL
(Transferor)	

ANNE P. JONES,
TRUSTEE
(Transferee)

For Transfer of Control of
LTB (WPGH-TV) Corp., Licensee of
Station WPGH-TV), Pittsburgh,
Pennsylvania, and of Television
Broadcasting Corporation, Parent of
the Licensees of Stations WSUR-TV,
Ponce, Puerto Rico, and WLII(TV),
Caguas, Puerto Rico

DECISION

Adopted: October 13, 1988 **Released: October 14, 1988**

By the Commission:

INTRODUCTION

1. This case involves the question as to whether a transfer of stock of a licensee corporation from its current controlling owner to a trust will serve the intended purpose of insuring that the stations are not attributed to the beneficiaries of that trust. The question is raised by the applications set out in the caption, in which Lorimar Telepictures Corporation (Lorimar) seeks our consent to the transfer of control of its three television stations to the Honorable Anne P. Jones, Trustee. BHC, Inc. (BHC), filed a petition to deny the application on August 8, 1988. We consider here the applications, the petition and related pleadings.[1]

BACKGROUND

2. Warner Communications, Inc. (Warner), and Lorimar have agreed to merge by exchanging stock valued at about1.2 billion. Under the plan of merger, Lorimar will retain its corporate identity, but as a wholly owned subsidiary of Warner. Lorimar's interests in the broadcast stations[2] represent about four percent of the total value of the merger.[3] Lorimar has reached an agreement in principle to assign the license for station WPGH-TV to Renaissance Communications Corp., but has not yet found a buyer for its interests in stations WLII(TV) and WSUR-TV. In order to expedite the merger, Lorimar proposes to place its interests in all three stations in trust so that, if approved, the larger transaction can move forward while buyers can be found and applications filed to assign, or transfer control of, the Lorimar stations.[4] Lorimar and Warner take the position that, once the transfer of control to the trust is approved, neither will have an attributable interest in the stations, under the standards set out in *Attribution of Ownership Interests*, 97 F.C.C.2d 997 (1984), *reconsidered in part*, 58 R.R.2d 604 (1985) *further reconsidered*, 1 F.C.C. Rcd. 802 (1986) (*Attribution*).

3. Petitioner BHC, through subsidiaries, controls seven television stations.[5] BHC and Warner now own minority interests in one another. Specifically, Warner owns 20 percent of BHC's voting stock (convertible to a 42.5 percent interest), while the remaining 80 percent is held by Chris-Craft Industries. BHC is Warner's largest shareholder, with a total voting interest of about 17.1 percent.[6] BHC's petition is based on its belief that there are serious questions as to whether the proposed transaction does in fact meet the insulation standards pertaining to trusts set out in *Attribution*. 97 F.C.C.2d at 1023-24. If insulation is not achieved, then Warner, and hence BHC, would have attributable interests in the Lorimar stations upon the closing of the Lorimar-Warner merger, which would limit BHC's ability to acquire additional media properties. BHC seeks changes in the trust or the imposition of conditions to meet its concerns. Alternatively, if we disagree with its assessment as to the need for changes or conditions, BHC requests an affirmative ruling that the Lorimar stations will not be attributable to it during the life of the trust.

4. The proposed Trustee is former FCC Commissioner Anne P. Jones. None of the pleadings filed in this case challenge her qualifications. She meets all the criteria for holding a broadcast license and the standards established for independent trustees. That is, as required by our decision in *Attribution*, 97 F.C.C.2d at 1024, she has no family relationships with principals of the parties to the applications, and she has no business relationships with those parties or their principals, except to the extent required to establish the trust.

MOTION FOR EXPEDITED ACTION

5. Lorimar requests expedited action on its applications. BHC does not oppose such expedition. Lorimar states in support of its motion that our prior approval of the transfer of control of the licenses to the trust is a condition precedent to closing the Warner-Lorimar merger. Lorimar advises that its shareholders will be voting on the merger on October 17, 1988, and that a prompt closing is anticipated, if the shareholders give their approval. It relates that the stations represent a very small proportion (four percent) of the total value of the transaction and notes our statements that unnecessary regulatory delays are contrary to the public interest. *See, e.g., Tender Offers and Proxy Contests*, 59 R.R.2d 1536, 1539-40 (1986).[7]

6. Our action here grants Lorimar's motion, based on the above factors. In view of Lorimar's request, which is not opposed by BHC, we shall proceed based on the material before us, and impose conditions where required. In that regard, we specifically note Lorimar's statement in its motion for expedition that it "is prepared to effect any and all modifications to the Trust agreement that the Commission may consider necessary."

PROCEDURAL MATTERS

7. Although styled as a petition to deny, BHC's pleading does not in fact seek denial of the application. Instead, BHC's objective is to insure that the applications accomplish their intended purpose: nonattribution of the Lorimar stations, when placed in trust, to Lorimar, Warner and its shareholders, including BHC. BHC contends that attribution of the Lorimar stations to it would adversely affect its ability to acquire new media properties. In these circumstances, we agree with the applicants that BHC's pleading is more accurately characterized as a request for a ruling. Even so, Lorimar and Warner also seek a fully insulated trust so as to avoid attribution. While the applications at issue here are otherwise able to be granted, it would serve no useful purpose to grant them if that action would not achieve the requested result. We therefore believe it is appropriate to consider the matters alleged by BHC in connection with our consideration of the applications.

8. Warner asserts that BHC's petition is not supported by an affidavit from a person with first-hand knowledge of the facts. As noted by BHC, however, the material facts alleged are taken from the applications and other information on file with us and the Securities and Exchange Commission. Section 309(d) permits us to take official notice of such facts. In addition, we note that Warner does not challenge any of the relevant facts set out in BHC's petition, only the conclusions to be drawn from them. Accordingly, we can rely on the facts alleged.

SUBSTANTIVE MATTERS

9. In *Attribution*, we noted that trusts can be established for a variety of reasons, including estate planning, income for dependents, or avoidance of divestiture of a valuable investment that might otherwise conflict with a Commission requirement. 97 F.C.C.2d at 1023. With specific applicability to this case, we stated that trusts "are often used to execute a multiphase transaction. . . ." *Id.* Further, "trusts should be facilitated to the extent possible." *Id.* We did establish generally applicable guidelines for evaluating trusts as insulating mechanisms, for whatever reason they might be established, to further the interests of prudent deregulation. We emphasized, however, that we would judge "their acceptability for our purposes on a case-by-case basis." *Id.* at 1024. We have subsequently made such case-by-case judgments.[8] Except as noted below, the trust before us complies with the guidelines for trusts set out in *Attribution*. With that background, we turn to the specific issues raised by BHC.

10. *Control of the Sale of Trust Assets*. BHC contends that Lorimar and Warner will retain control of the sale of the trust assets. It quotes our statement that "questions as to whom the assets should be sold and the terms of the sale would remain within the sole discretion of the trustee." *Macfadden*, 104 F.C.C.2d at 561. In this case, although the Trustee is obligated to sell the trust assets at the earliest possible date, the trust specifically reserves to Lorimar and, after the merger, Warner, the right to approve the financial terms and conditions of the sale. Although the trust provides that the beneficiaries' consent to those terms and conditions will not be unreasonably withheld, BHC contends that such a provision is not easy to administer and might involve the Commission in determinations as to the reasonableness of the beneficiaries' judgment. Secondly, Lorimar allegedly has retained two investment bankers to assist in finding buyers for the stations. These are agents for Lorimar, according to BHC, and will be guided by Lorimar's instructions. Finally, BHC notes that the trust requires the beneficiaries to cooperate with the Trustee in providing information, representations and warranties regarding the stations that might be deemed necessary or desirable to facilitate the sale of the stations to a new entity. The combination of these factors, BHC asserts, "presen[ts] the clear danger that the trustee could be reduced to little more than a by-stander in the negotiation and conduct of any sale transaction."

11. In opposition, Lorimar generally contends that BHC ignores the independence of the Trustee, who is bound by the terms of the trust, her own fiduciary obligations and Commission policy to act independently of the beneficaries. Moreover, Lorimar states that both Lorimar and Warner will be bound by the trust, which limits their actions as to the sale of the trust assets. Lorimar states that the cases cited by BHC involved hostile tender offers, and believes that such cases can be distinguished from the case here. Nevertheless, Lorimar contends that the proposed trust is consistent with those cases. It states that only the Trustee holds the power to sell the stock and that the beneficaries hold only the right to approve financial terms and conditions. Thus, the Trustee will identify the buyer and negotiate the terms of the sale. Lorimar notes that, under the trust, it is bound not to withhold unreasonably its approval to the financial terms and conditions negotiated by her. Lorimar states that this limitation insures that the beneficiaries will not have an unqualified veto power over the disposition of the trust assets and cannot control their disposition. Finally, Lorimar and Warner state that they have agreed to an amendment to the trust that would grant the Trustee "final authority over any such sale, including the terms and conditions," but only after "consultations" with the beneficiaries.

12. With regard to the use of investment bankers to find buyers for the stations, Lorimar states that one of them was in fact hired by TeleOnce, the licensee of station WLII(TV). Because of the corporate organization and shareholders agreement (see footnote 2, above), Lorimar states that it is unable to hire or fire outside advisors for TeleOnce. Lorimar states that the provision in the trust authorizing the use of the investment bankers was put in at the request of the Trustee to assure that expert financial advice would be available to her in the disposition of the stations. Finally, Lorimar contends that any advice offered can be accepted or rejected by the Trustee, and that she can replace the one company if she wishes, although concurrence of TeleOnce's minority shareholders apparently would be needed to replace the other.

13. With respect to BHC's concerns as to Lorimar providing certain information to the Trustee, Lorimar states that this trust provision was also added at the behest of the Trustee to assure that certain representations, such as good title to property, could be given to her if needed in the negotiations for the sale of the stations. Lorimar believes that this provision facilitates the sale, and does not compromise the Trustee's ability to negotiate independently with prospective buyers and to dispose of the trust assets.[9]

14. In reply, BHC still contends that the mechanisms set out in the trust do not ensure the beneficiaries' noninvolvement in the sale of the stations, as required by *Attribution*, 97 F.C.C.2d at 1024. It also states that an amendment

to the trust to give the Trustee the final determination as to the terms and conditions of the sale, after "consultations" with the beneficiaries does not cure the problem. In BHC's opinion, such direct consultations, in contrast to a simple affirmative or negative response, appears to make matters worse, not better.

15. *Discussion - Control of the Sale of Trust Assets.* In *Attribution*, we concluded that if the assets of a trust are not to be attributed to the beneficiary, the decision to sell trust assets must either be the trustee's sole prerogative or a decision shared by the trustee and the beneficiary. 97 F.C.C.2d at 1024. We reached the same determination in the context of hostile takeovers, at a time after the trustee had accepted and paid for the tendered stock and before the beneficiary had been approved under long-form review. *Macfadden*, 104 F.C.C.2d at 561. We added, however, that decisions "as to whom the assets should be sold and the terms of the sale" were for the trustee to make, not the beneficiary. *Id.* The purpose of that requirement is to limit a beneficiary's "effective power to select the purchaser(s) and terms by virtue of its veto power over any transaction proposed by the trustee." *Acquisition I*, 60 R.R.2d at 1102. This limitation on the beneficiary's control over the trustee's decisions is necessary to insure effective insulation. In this case, the decision to sell has been made: the trust itself calls for the sale. We do not see why that fact should mean that in this case the beneficaries should be permitted to exercise the "effective power" to select purchasers under the guise of reviewing financial terms, or to hold out for specific terms. The fact that the beneficiaries may not, under the trust, be unreasonable in agreeing to financial terms and conditions ameliorates our concerns somewhat. Nevertheless, permitting such a provision moves us away from an easy-to-administer, bright-line test. Nor do we have any desire to monitor any decisions made by Lorimar to determine their "reasonableness." We also agree that the substitute proposal offered by Warner and Lorimar does not allay our concerns. Indeed, the proposed "consultations" as to financial terms and conditions implies direct negotiations and discussions. Any such discussions are not subject to meaningful monitoring and may go beyond the intended subject matter. As we have stated earlier, we do not question the integrity of the individuals involved, but "we must rely heavily on the structure of the relationship to assure appropriate insulation." *Macfadden*, 104 F.C.C.2d at 564. Therefore, if the insulation provided by the trust is to be effective, such "consultations" cannot be permitted. We shall condition our action accordingly.[10] We believe that the Trustee should be solely "guided in [her] decision by [her] general fiduciary obligations." *Id.* at 561-62.

16. We are concerned, of course, that the beneficiaries not be able to hire agents to act for them in areas where they cannot act themselves. This is the concern expressed by BHC in regard to the selection of two investment bankers to aid in the sale of the stations. Nonetheless, we do not believe that significant concerns as to a loss of control of the sale of trust assets is involved, particularly in view of the condition discussed in the preceding paragraph. The Trustee should be privy to any instructions they may have received from either Lorimar or TeleOnce. The investment bankers are advisors, and the Trustee is free to reject any advice offered. As noted, the Trustee is an independent person and will be guided by her fiduciary obligations in this regard. She is free to give whatever instructions she wishes to the company involved in the sale of station WPGH-TV,[11] and may, with the concurrence of the minority shareholders, be able to do the same for the investment banker involved in the sale of stations WLII(TV) and WSUR-TV. Moreover, there is nothing in the trust instrument that bars her from hiring her own investment banker. Therefore, we do not believe that any additional conditions are warranted on this point.[12]

17. The provision as to communications that is of concern to BHC is set out in section 6(b) of the trust. It provides: "Beneficiary shall cooperate with the Trustee in providing any information, and such representations and warranties as are set forth in the Merger agreement, regarding the [Lorimar stations] deemed necessary or desirable to facilitate such transactions." Lorimar has represented that this provision was put in the trust at the request of the Trustee to assist her in the performance of her duties. Further, we do not understand the provision to grant Lorimar direct access to potential buyers. First, the person who must "deem" the information "necessary or desirable" to negotiate the sale is the Trustee. We understand that her request must be in writing, as must Lorimar's response. Under the trust, any sales are to be negotiated by the Trustee, not Lorimar. Further, Lorimar's response will be directed to the Trustee, not to a potential buyer. We therefore view this provision to be a reasonable means to facilitate the sale of the stations. It does not appear that it will break down the insulation between the Trustee and the beneficiaries to such a degree that the latter should be considered to have attributable interests. To assure that there is no misunderstanding on this point, however, we shall impose an appropriate condition. (*See* condition "F.") For all of the above reasons, we conclude that, as conditioned, the beneficiaries will not be able to exert influence over the sale of the trust assets sufficient to result in attribution of the interests in question.

18. *Control of Station Finances.* BHC notes that the trust agreement requires Lorimar to establish lines of credit that will be available to the Trustee. Although the trust provides that the use of the funds is solely within the Trustee's discretion, BHC contends that Lorimar, and Warner, after the merger, will negotiate the terms of the credit. BHC states that the "terms and conditions of these loan agreements, over which the trustee has no control, would normally include restrictive covenants and conditions concerning events of default that will result in Lorimar and Warner continuing to exert significant influence over the trustee and the operation of the stations." Such financial arrangements go to the heart of station operation, in BHC's opinion. Because of the beneficiaries' role in negotiating the terms of the loans, BHC concludes that we cannot determine that the operation of the stations will be truly independent unless we review the loan agreements.

19. In its opposition, Lorimar provides more details as to the nature of the lines of credit involved in this case. Lorimar states that it will arrange a2 million credit facility for station WPGH-TV. TeleOnce, licensee of station WLII(TV), already has a25 million line of credit, which Lorimar will seek to increase to30 million. That increase, and any use of the funds must be approved by TeleOnce, which is the "primary obligee" of the loan. Lorimar states that it will act only as the guarantor of the credit facility and will have no control over it. In addition, Lorimar notes that the trust limits the use of the funds for the management and operation of the stations, and provides that the use of any funds is within the sole discretion of

the Trustee. We are further advised that by the terms of the trust, Lorimar "shall take no action to revoke or cancel" the credit. Lorimar views the lines of credit as not restricting the Trustee, but as serving to enhance the Trustee's independence by assuring that Lorimar or Warner will not be able to exercise control over the finances of the stations.

20. In reply, BHC again emphasizes that loans are not simply a promise to lend funds, but "uniformly" contain terms and conditions affecting the management and operation of stations. BHC contends that we cannot determine whether the lines of credit come with unacceptable strings attached, unless we review the agreements in question.

21. *Discussion - Control of Station Finances.* We believe appropriate conditions can be imposed to meet our concerns in this area. The trust already imposes significant restrictions. The funds are to be used in the sole discretion of the Trustee for the operation and management of the stations. Lorimar cannot revoke or cancel the lines of credit. In addition, with respect to the line of credit for station WPGH-TV, we shall also require that Lorimar: (1) cannot participate in any decisions to draw on the line of credit, and can serve only as a guarantor of the amounts borrowed; (2) cannot participate in any decisions as to when or how the money will be spent; and (3) cannot communicate with the lender(s) (except as may be necessary to effectuate specific terms in the loan agreement solely concerning the guarantee) or the Trustee concerning the credit facility. Of course, the Trustee will be limited in her use of the funds by the terms of the trust and her fiduciary obligations.

22. The line of credit for TeleOnce presents slightly different questions. Notably, a25 million line of credit already exists. Any terms and conditions now in place are the result of previous negotiations between TeleOnce/Lorimar and the lender(s). Any action on Lorimar's part as to the existing line of credit at this time is subject to the shared approval of TeleOnce, which is the primary guarantor of the debt. Lorimar's influence and obligation is thus limited and secondary. Any current restrictions on the use of the funds, such as those provisions BHC states are "uniformly" specified, were imposed by the bank to protect its interests. They typically include, for example, limits on total debt or debt/equity ratios. They would not be designed to insure or result in Lorimar's influence over the operation of the stations at some future date. Lorimar already shared control of the station at that time. If no changes were made in the line of credit, the Trustee would be expected to exercise any prerogatives she possesses as to that credit facility. We do not believe that any additional concerns would arise in the negotiation of an additional5 million to the credit facility. Again, however, Lorimar: (1) cannot participate in any decision to draw on the line of credit, and can serve only as a guarantor (or coguarantor along with TeleOnce) of the amounts borrowed; (2) cannot participate in any decisions as to when or how the money will be spent; and (3) cannot communicate with the lender(s) (except as required by the terms of the loan concerning the guarantee) or the Trustee concerning the credit facility. Given these conditions and the circumstances set out above, we can conclude with a high degree of confidence that the necessary insulation exists. If the Trustee, on the other hand, believes that the provisions of the credit facility unduly restrict her discretion, she can work with TeleOnce to revise the existing credit facility or negotiate a new one.

23. *Continuing Relationships between Lorimar and the Stations.* BHC alleges that the trust and the applications do not address the problems of severing a parent from its subsidiaries, due to personnel and management interrelationships. It states that in an analogous situation, we imposed conditions to assure no substantial influence by a former owner over stations placed in trust, citing *Gillett*, 2 F.C.C. Rcd. at 7107. Although BHC concedes that the trust requires that any officers, directors or employees who now serve Lorimar and one or more of its broadcast subsidiaries will resign such dual roles (BHC lists thirteen persons who now hold such dual positions), BHC believes that Lorimar will continue to exercise substantial influence over its former subsidiaries when they are placed in trust. It contends in that regard that the trust does not expressly bar direct communications between the beneficiaries and the stations.

24. BHC further asserts that Lorimar and its subsidiaries have employed the same law firms and other consultants and advisors, and believes that the stations will continue to share legal and business strategy and planning with Lorimar. BHC notes our decision in *Reliance II*, 60 R.R.2d at 1212 n. 9 and 1214, where we specifically required that a trustee stop using an investment banker also used by a tender offeror/beneficiary. Because the trust calls for Lorimar to reimburse the Trustee for reasonable expenses, including advisors, BHC concludes that the independence of those advisors from Lorimar cannot be assumed. Finally, BHC notes that Lorimar and Warner are extensively involved in the production and distribution of television programming. It refers to a recent newspaper weekly program guide that lists broadcasts by station WPGH-TV two Monday-through-Friday and two weekly programs distributed by Lorimar, and one Monday-through-Friday and one weekly program distributed by Warner. BHC believes that the extent to which either beneficiary has on-going program supply arrangements with the stations should be disclosed so that we can determine whether continuation of those business relationships is consistent with the needed degree of insulation.[13]

25. Lorimar characterizes BHC's concerns as speculative. Lorimar distinguishes the *Gillett* case on the ground that it involved placing the stations under the control of a former employee of the grantor of the trust. This case, in contrast, involves placing stations under the control of a Trustee who has no former business relationships with the beneficiaries. Lorimar notes that the trust prohibits the beneficiaries from directly or indirectly attempting to influence the operations of the stations. Further, Lorimar states that if former employment were a basis for finding a lack of adequate insulation, the trustee would be required to take the disruptive and unnecessary step of firing all existing employees.

26. With regard to consultants or advisors, Lorimar states that TBC and TeleOnce do not employ the same law firm or accounting advisors as are used by Lorimar. In Lorimar's view, BHC erroneously assumes bad faith on Lorimar's part, and the presence of a trustee who would blindly follow the advice of counsel and accountants. Further, Lorimar, Warner and the Trustee have already agreed to use independent counsel, a matter specifically contemplated by the trust. With regard to programming, Lorimar states that it and Warner provide less than ten percent of station WPGH-TV's weekly programming. Further, they:

> are allowed to offer programming on an arms-length basis to the Stations on parity with all other program suppliers, [but] the stations are neither encouraged nor required to purchase their programs. [Lorimar] and [Warner] will simply be treated as any other program supplier. The Stations will exercise their independent judgment to accept or reject any program offered.

27. In reply, BHC still does not believe that sufficient insulation will exist in light of the past relationships among the parties. In regard to on-going or future programming relationships between Warner, Lorimar and the stations, BHC states that Warner and Lorimar are not on parity with other program suppliers, in view of their beneficial ownership of the stations and their receipt of operating reports from the Trustee. BHC states that if the stations and the beneficiaries are permitted to discuss programming matters, "there is no way to assure that such conversations will not range into prohibited areas of communications as well." BHC believes that the *Gillett* case involved similar concerns, and states that a strict "no communications" standard was imposed in that case. 2 F.C.C. Rcd. at 7107. BHC observed that the Trustee's use of independent counsel is permitted but not required by the trust and states that even this permissive provision does not apply to other common consultants or advisors. BHC believes that conditions may be needed to insure the independence of the Trustee and her insulation from the influence of the beneficiaries through such surrogates.

28. *Discussion - Continuing Relationships between Lorimar and the Stations.* The conditions required by the circumstances of *Gillett* are not factually required here.[14] In this case, we believe that a specific condition limiting communications to specified matters should be imposed to assure the necessary degree of insulation. Similarly, a condition that the Trustee shall use independent counsel will also be imposed. Lorimar has not discussed the use of common accountants or other advisors by Lorimar and the stations, except to note that TBC and TeleOnce do not share accountants with Lorimar. Accountants, like lawyers, ordinarily have an on-going relationship with their clients. We conclude, therefore, that the Trustee should arrange for separate accountants for station WPGH-TV. BHC has not identified the "other advisors" to which it refers. Most others that come to mind, such as engineering consultants and employment or on-air talent consultants, may be hired specifically to affect station operations, but are usually employed for limited tasks on an irregular basis, and do not carry with them the same degree of concern as to control. As to such other unidentified consultants, therefore, we believe that the strict "no communications" condition, which prohibits indirect as well as direct communications or efforts by Warner or Lorimar to influence the operation of the stations, coupled with the independence of the Trustee and her ability to hire new advisors or to reject the advice of those that may be currently under contract, will provide the required degree of insulation.

29. We have mentioned above the hiring of investment bankers to assist in finding buyers for the stations, and concluded that the Trustee is free to avail herself of their efforts. In *Acquisition I*, above, we did require the target company to cease the use of an investment banker that was also hired by a party tendering for the shares of the target in a friendly transaction. 60 R.R.2d at 1101. In that case, the investment banker was one of the investors in the offeror, and would have a significant role in obtaining financing for its client offeror. Further, that relationship would continue at least until the termination of the trust established there; that is, until the Commission approved the long-form application transferring control of the licensee from the trustee to the offeror. In the case before us, the record does not establish that the investment banker is an investor in Lorimar. More significantly, upon the beginning of the trust, the relationship between Lorimar and the investment banker ceases, and the investment banker becomes an agent solely for the Trustee. Therefore, we do not believe that the Trustee is required to find a different investment banker to assist her.

30. We turn now to the provision of programs to the stations by Lorimar and Warner. We have set out and discussed above the limited extent to which communications are permitted under the trust between Warner and Lorimar on one hand, and the Trustee on the other. The trust agreement, as discussed above, permits limited communications; for example, reports in writing from the Trustee to the beneficiaries concerning the operation of the stations. We find nothing in the trust instrument that permits communications of any kind concerning the provision of programming to the stations. By the terms of the trust itself, then, such communications are not permissible.[15]

31. *Limitations on BHC.* As noted at the outset, BHC is Warner's largest (17.1 percent) shareholder. BHC states that the use of a trust would seem to require that any restrictions on Lorimar and Warner should apply equally to the conduct of the beneficiaries' significant shareholders. Under the terms of the trust, BHC states that it is free to communicate and do business with the Trustee, and is free to influence the management and operations of the stations. Warner, in response, states that our decision in *Attribution* focuses on the relationship between the Trustee and the beneficiary, not the shareholders of the beneficiary. Warner further relies on the ability of the Trustee to resist any undue influence from BHC. In any event, Warner suggests that we can order BHC to avoid improper activities, if we are concerned about improper actions on BHC's part.

32. We believe BHC's concern can be answered quickly. First, under the conditions set out in paragraph 35, as discussed above, Warner and Lorimar cannot use BHC as their agent to communicate with or influence the Trustee or station operations. Thus, the insulation between the Trustee and the beneficiaries remains intact. Second, the record does not establish that BHC regularly engages in providing programming or other services to other broadcasters. It is not apparent, therefore, that it provides anything that might be of interest to the Trustee in her oversight of the stations, who, as noted, was selected in part because she is an independent person.[16] Third, the Trustee is able to reject any communications, services or goods offered by BHC to her. We believe she would decline any such offers, if they might result in a breach of her fiduciary duty, which includes maintaining the insulation between her and the beneficiaries. Fourth, the Trustee holds exclusive voting rights in the trust assets; BHC has none. Finally, BHC filed its petition for the stated purpose of assuring that the Lorimar stations would not be attributed to it. It now posits that it might deliberately take unspecified actions that somehow might result in attribution of the stations to BHC. If it does so, then it

will bear the consequences of those actions; that is, the stations will be attributed to it. If it wishes to avoid any problem, it can conduct itself as though governed by the trust and the conditions set out below.[17]

CONCLUSION

33. BHC's petition raised legitimate concerns. Nonetheless, as conditioned below, we believe that the trust will provide sufficient insulation so that the Lorimar stations, once placed in the trust, will not be attributable to Lorimar or Warner, or to BHC through Warner. We find the applicants are fully qualified and that a grant of the applications will serve the public interest, convenience and necessity.

34. Accordingly, IT IS ORDERED, That the Petition filed by BHC, Inc., IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

35. IT IS FURTHER ORDERED, That the applications set out in the caption ARE GRANTED, subject to the following conditions:

A. The terms and conditions of the sale of the trust assets shall be determined solely by the Trustee, guided by her fiduciary obligation to the beneficiaries of the trust.

B. The establishment of a new credit facility and the increase in the amount of an existing credit facility shall be completed prior to the placing in trust the stock now controlled by Lorimar in the subject licensees. With regard to the credit facilities: (1) Lorimar and Warner can serve only to guarantee the funds lent; (2) Lorimar and Warner cannot participate in any decision to draw on the credit facility or in any decisions as to when or how the funds will be spent; and (3) Lorimar and Warner cannot communicate directly or indirectly with the Trustee, the lender(s) (except as may be necessary to effectuate specific terms in the loan agreement solely concerning the guarantee), TBC, TeleOnce or their officers, directors and employees on any matter concerning the credit facilities, except in writing as to such matters as may be required under the terms of the existing25 million credit facility.

C. The Trustee shall not hire counsel or accountants to advise her that are employed by, or under contract to, Lorimar and Warner.

D. Lorimar and Warner, and their officers, directors and employees including personnel employed by subsidiaries or affiliates of Lorimar and Warner shall not involve themselves, directly or indirectly, in the operation or management of the trust assets, or seek to influence the operation or management of the trust assets.

E. Except as is specifically permitted by the trust instrument and this Decision, there shall be no communications whatsoever, oral or written, between: (a) Warner and Lorimar, its subsidiaries and affiliates, and their officers, directors and employees; and (b) the Trustee, or the personnel of the trust assets.

F. Any communications from the Trustee to the beneficiaries under section 6(b) of the trust instrument shall be in writing. The beneficiaries' response shall also be in writing and directed to the Trustee, not directly to a buyer or potential buyer.

G. Any such communications required to be set forth in writing by the trust and the conditions specified above shall be considered station records and shall be retained by the Trustee for inspection by the Commission upon request, under the provisions of 47 C.F.R. §73.1226.

H. A copy of this decision shall be placed in the public inspection file of each station subject to this decision and shall be retained in that file in accordance with provisions of 47 C.F.R. §73.3526, or until the trust terminates, whichever is longer.

36. The Mass Media Bureau shall mail copies of this Decision to the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The related pleadings are: (1) an opposition dated August 18, 1988, filed jointly by Lorimar and Ms. Jones (subsequently "Lorimar" for ease of reference, when characterizing the contentions set out in this pleading); (2) an opposition filed by Warner Communications, Inc., on August 18, 1988; (3) a consolidated reply filed August 25, 1988, by BHC; (4) a request for expedited action dated September 14, 1988, filed by Lorimar, and supported by Warner; and (5) BHC's comments on that request, filed September 16, 1988.

[2] Lorimar owns all of the stock of LTB (WPGH-TV) Corp. Lorimar states that it shares control of Television Broadcasting Corp. (TBC) with TBC's minority stockholders. TBC controls TeleOnce Corp., licensee of station WLII(TV), and American Colonial Broadcasting Corp., licensee of station WSUR-TV, which is a satellite of station WLII(TV). Specifically, Lorimar owns TBC Class A and Class B common voting stock representing a total voting interest of 50.96 percent. Under a shareholders' agreement, however, Lorimar can elect only six of the 13 TBC Directors.

[3] Lorimar's principal business is the production and distribution of theatrical films, and of television and home video programming.

[4] Expedition is the stated basis for the use of a trust in this case. The applicants have identified no media properties owned by Warner that would conflict with the multiple-ownership rules, and none are apparent. The trust, therefore, is not needed to comply with those rules.

[5] These stations are: KCOP(TV), Los Angeles, California; KPTV(TV), Portland, Oregon; KMSP-TV, Minneapolis, Minnesota; KTVX-TV, Salt Lake City, Utah; KMOL-TV, San Antonio, Texas; KUTO(TV), Phoenix, Arizona; and KBHK-TV, San Francisco, California.

[6] *News International, PLC*, 97 F.C.C.2d 349 (1984), contains more information as to the origin and nature of the minority interests that Warner and BHC have in one another.

[7] The procedures set out in *Tender Offers and Proxy Contests* are not available in the context of the case before us, which involves normal, long-form procedures.

[8] These cases include: *KKR Associates (Gillett)*, 2 F.C.C. Rcd. 7104 (1987) (*Gillett*) ; *J. B. Acqusition Corp.*, 60 R.R.2d 1095 (*Acquisition I*), *further considered*, 60 R.R.2d 1207 (1986) (*Acquisition II*) ; *Macfadden Acquisition Corp.*, 104 F.C.C.2d 545 (*Macfadden*), *further considered*, 60 R.R.2d 872 (1986); and *Owosso Broadcasting Co.*, 60 R.R.2d 99 (1986) (*Owosso*).

[9] Warner's position is similar to Lorimar's, and its contentions on the matters set out above need not be separately stated. It does make additional arguments that can be disposed of without extended discussion. Warner cites *Wolverine Cablevision, Inc.*, 69 F.C.C.2d 1487, 1492-93 n. 11 (1978), *Rust Craft Broadcasting Co.*, 68 F.C.C.2d 1013, 1018 n. 12 (1978), and *Television Wisconsin, Inc.*, 68 F.C.C.2d 1028 (1978), as support for its position that in a divestiture case, in contrast to a hostile takeover, the Commission has acceded to a variety of powers retained by the beneficiary of a trust, including the ability to compel the sale of trust assets. Those cases involved trusts that were limited to two years duration, at the end of which the interests in question were required to be divested. The Commission did not find the interests noncognizable under that rule, but *waived* the cross-ownership rule (47 C.F.R. §76.501) in question there. Most importantly, those cases all preceded our decision in *Attribution*, which we adopted in a notice and comment Rule Making proceeding. Thereafter, we twice stated that trust insulation standards that preceded *Attribution* would no longer govern. *Macfadden*, 104 F.C.C.2d at 565; *Owosso*, 60 R.R.2d at 102-03. Accordingly, the cases cited by Warner are inapplicable here. Warner also refers to actions on applications (no decisions were adopted) that approved trusts allowing beneficiaries to establish a range of prices for the sale of trust assets. Those actions also preceded the adoption of our current standards in *Attribution* and similarly do not govern in this case. Finally, *Attribution* specifically noted that trusts might be established for a variety of purposes, 97 F.C.C.2d at 1023, but did not establish different standards or degrees of insulation depending on the purpose for which the trust was established. We recognize that our case-by-case review of trusts intended to avoid attribution of ownership interests may result in the imposition of different conditions, as might be warranted in different circumstances. We nevertheless reject the general proposition, suggested by the applicants, that less stringent guidelines should be applied to insulating trusts, such as the one before us, than would be applied to cases involving hostile takeover attempts.

[10] We do not imply that all limits on the trustee's discretion are impermissible, if set out in the trust agreement where they are subject to our review. For example, we do not perceive any undue influence on the trustee by a beneficiary or a diminution of insulation if the trust instrument specifies that complete payment must be made at the closing of the sale, instead of installment payments.

[11] Concerns as to Lorimar's alleged ability to be involved in the sale of station WPGH-TV will become moot if Lorimar executes a sales contract with Renaissance Communications Corp. before the station is placed in trust; that is, at a time whem Lorimar controls the station and the concerns as to insulation have not yet attached. The Trustee's fiduciary obligations in that event would be to carry out the terms of the contract, file any required application, and oversee the operation of the station until such time as the sale is approved and closed.

[12] *See also* the discussion of this subject in paragraph 29, below.

[13] BHC also contends in its petition that Warner is not bound by the terms of the trust. Because Lorimar will become a subsidiary of Warner after the proposed merger, BHC correctly concludes that, to insure insulation, Warner would have to be bound by the trust and by any conditions we might impose, in the same manner as Lorimar. In opposition, Warner asserts that it is bound to carry out the provisions of the trust, both by its terms and as a matter of law. In any event, it has signed and submitted a formal agreement to be bound by the trust. We believe that this agreement eliminates any concerns on this point as to Warner and its officers, directors and employees. The conditions set out in paragraph 35, as discussed above, will be applicable to Lorimar and Warner.

[14] Among other things, *Gillett* involved assigning licenses to an entity controlled by a former high-level employee of the assignor. Here, control of the licenses will be transferred to a trustee who has no prior business relationships with the assignor/beneficiary.

[15] Existing contracts may continue as previously negotiated until they terminate. Further, any such existing contract that permits renewal for specified periods, solely upon notification, may be renewed. Ministerial written communications in connection with existing contracts, such as bills and installment payments or instructions on the shipment of films or videotapes, would also be permissible.

[16] BHC has not alleged that there exists, or have existed, any family or business relationships between the Trustee and BHC. Because BHC or its principals would have been a party to any such relationship, we would have expected BHC to have brought them to our attention, if they in fact exist.

[17] *Acquisition I*, above, in part involved questions concerning a shareholder/investor in the beneficiary of a trust. As previously noted, however, what was said there was in the context of a tender offer in which the trustee served to collect the stock and operate the stations on a temporary basis, subject to limitations, until such time as the Commission approved the qualifications of the offeror/beneficiary on a long-form application. The offeror employed an investment banker to arrange the financing for the tender offer. That same investment banker was also an investor in the offeror and an adviser for the target company. We imposed conditions requiring that the target break its business relationship with the investment banker and banned communications between them. We do not believe that BHC's role solely as a Warner investor/shareholder presents the same kind of presence and influence as found in *Acquisition I*, requiring the imposition of the same or similar conditions in this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

County of San Diego, San Diego, California — File Nos. 737065 & 737066, Case L-2504

For a waiver of the Rules to allow use of 12 GHz frequencies in a manner not provided for by Rules 94.15(d) and 94.65

WAIVER

Adopted: October 17, 1988; Released: October 26, 1988

By the Chief, Land Mobile and Microwave Division:

1. The County of San Diego, California (County), seeks a waiver of Sections 94.15(d) and 94.65, 47 C.F.R. §§ 94.15(d) and 94.65, to permit the paired use of frequencies in the 12.2-12.7 GHz band normally reserved for unpaired use.[1] According to the County, it has a unique and immediate need for additional communications to support its law enforcement and other activities along the U.S.-Mexico border. In this regard, the County states that the two frequencies it seeks would serve as a new communications link between its two-way remote base station at Lyons Peak, California, and a new station to be constructed in San Ysidro, California.

2. The County also notes that due to funding problems it plans on using equipment which it already owns and which is already tuned to the frequencies it seeks, thereby avoiding the costs associated with modifying or purchasing new equipment. The County pleads, in this regard, that it would not be able to implement the proposed communications system if it is required to rechannelize its existing equipment. The County also states, however, that it will eventually replace the equipment and convert to alternate frequencies once funding is available.

3. The Commission, in its *Inquiry Into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, 90 F.C.C. 2d 676 (1982), reallocated the 12.2-12.7 GHz band for use by the broadcast satellite service. Operational fixed stations (OFS) which were authorized in the 12.2-12.7 GHz band on or before September 9, 1983, were not required to protect operating DBS systems from interference until September 9, 1988. OFS operators were given a five year transitional period to relocate to other frequencies before being required to operate on a non-interference basis. *See Id.* at 699-703. *See also* Section 94.93(a), 47 C.F.R. § 94.93(a). Thus, OFS stations remaining in the 12.2-12.7 GHz band, as well as those authorized after September 9, 1983, are licensed on a non-interference basis and are required to make any and all adjustments necessary to prevent interference to operating domestic broadcasting-satellite systems. *See* Sections 94.65(h) and 94.93(b), 47 C.F.R. §§ 94.65(h) and 94.93(b).

4. Applications for new 12 GHz links in the OFS are rare because of their uncertain future, since future private fixed use of the 12 GHz band is dependent on the eventual popularity of DBS. In view of the possibly limited future of the 12 GHz band for private fixed use, it would be unnecessarily burdensome to require the County to rechannelize its existing equipment to a standard channel pair. The County states that its proposal would not cause interference and acknowledges that it may be forced to vacate these frequencies within the next few years if necessary to protect new DBS systems. The County, moreover, states that it plans to move to a standard frequency pair once funding is available.

5. The County has shown a unique need in this case. Since the proposed system would result in improved communications for law enforcement and other public safety purposes, without undermining the purpose of the Rules, which is to prevent harmful interference to DBS and OFS systems, we find the operation proposed to be in the public interest. *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

6. Accordingly, pursuant to Section 0.331, 47 C.F.R. § 0.331, and Section 1.3, 47 C.F.R. § 1.3, San Diego County's request for waiver of Sections 94.15(d) and 94.65(h) for the referenced applications is GRANTED for an indefinite term not to exceed two years. This authorization is granted on a secondary non-interference basis to any existing or future DBS licensees, or 12 GHz OFS licensees operating in accordance with Section 94.65.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile & Microwave Division

FOOTNOTE

[1] Section 94.15(d) requires that applicants for paired frequencies be assigned pairs in accordance with Section 94.65. Section 94.65(h) provides that frequencies in the 12.2-12.7 GHz band are unpaired, but may be used for OFS links on a secondary, non-interference basis to operating direct broadcast satellite systems.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 26, 1988

AMERITECH, BELL ATLANTIC, BELLSOUTH, PACIFIC BELL, NEVADA BELL NYNEX, US WEST, AND SOUTHWESTERN BELL FILE REVISIONS TO COST MANUALS

PLEADING CYCLE ESTABLISHED

In the *Joint Cost Order*, 2 FCC Rcd 1298 (1987), the Commission required certain telephone companies to file and obtain approval of manuals containing the methods they use to separate the costs of providing regulated telephone service from the costs of nonregulated activities. The carriers filed their manuals in 1987, and the Common Carrier Bureau has conditionally approved the manuals of 15 companies. In the orders conditionally approving the manuals, the Bureau required the carriers to periodically update the manuals, as appropriate. Carriers must submit proposed revisions to the manuals at least 60 days prior to implementation if the revisions change the cost categories and their allocation mechanisms, or change the way that employee time is allocated. The Bureau stated that the public will be afforded an opportunity to comment on revisions of this nature.

On September 30, 1988, the eight companies listed above filed proposed changes in the sections of their manuals that describe the cost categories and allocation mechanisms. Each of the companies is proposing revisions in its cost pools to reflect the detariffing of Customer Dialed Account Recording as required by the Commission's *NATA/Centrex Reconsideration Order*, 3 FCC Rcd 4385 (1988). Ameritech, Bell Atlantic, Pacific Bell, Nevada Bell, and Southwestern Bell all propose additional changes to their cost categories and allocation mechanisms. Ameritech proposes revisions in the apportionment and structure of cost pools and proposes several changes in narrative. Bell Atlantic proposes changes in cost pools to reflect the addition of new nonregulated service offerings. Pacific Bell proposes refinement of allocation methods; additional descriptive and clarifying language; changes in allocation methods; addition of new cost pools; inclusion of cost pools erroneously excluded from its March 21, 1988 cost allocation manual; and changes in methods of cost identification. Nevada Bell proposes additional clarifying language; changes in allocation methods; changes in cost pools; and, identification of two accounts as 100% nonregulated. Southwestern Bell proposes changes in allocation methods and a change in exception time reporting procedures. U S West and NYNEX propose changes to their cost allocation narratives.

Parties may file comments on the proposed revisions to the cost manuals no later than **November 17, 1988.** Replies should be filed by **December 1, 1988.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N. W., Room 812 and to International Transcription Services, Inc., 2100 M Street, N. W., Washington, D. C. 20036.

Copies of the carriers' revisions may be obtained from International Transcription Services, Inc., 2100 M Street, N. W., Washington, D. C. 20036, (202) 857-3800. Copies are also available for public inspection in the Accounting and Audits Division public reference room, Room 812, 2000 L Street, N. W., Washington, D. C. 20554.

For further information contact Alicia Dunnigan, (202) 632-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 26, 1988

CONTEL CORPORATION TELEPHONE OPERATING COMPANIES' FILE REVISIONS TO COST ALLOCATION MANUALS PUBLIC COMMENT INVITED

On October 3, 1988, Contel Corporation Telephone Operating Companies (Contel) filed revisions to its Part 64 cost allocation manuals for the separation of regulated and nonregulated costs. The original manuals were filed in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987). The Common Carrier Bureau approved the manuals on August 2, 1988, conditioned upon the filing of numerous specified revisions. *See Contel Corporation Telephone Operating Companies' Permanent Cost Allocation Manual* for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 4664 (1988).

Comments on the revisions to Contel's manual may be filed no later than **November 17, 1988**. Replies should be filed by **December 1, 1988.** Comments should reference file number AAD 7-1702. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N. W., Room 812, Washington, D. C. 20554 and to International Transcription Services, Inc., 2100 M Street, N. W., Washington, D. C. 20036, (202) 857-3800.

Copies of the cost manual revisions may be obtained from International Transcription Services, Inc. Copies are also available for public inspection and copying in Room 812, 2000 L Street, N. W., Washington, D. C. 20554.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 26, 1988

CINCINNATI BELL FILES REVISIONS TO COST MANUAL PUBLIC COMMENT INVITED

In the *Joint Cost Order*, 2 FCC Rcd 1298 (1987), the Commission required certain telephone companies to file and obtain approval of manuals containing the methods they use to separate the costs of providing regulated telephone service from the costs of nonregulated activities. Cincinnati Bell Telephone Company (Cincinnati Bell) filed its manual in 1987, and the Common Carrier Bureau approved the manual on September 26, 1988, conditioned upon the filing of numerous specified revisions. *See Cincinnati Bell Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, DA 88-1464, released September 26, 1988.

On September 30, 1988, Cincinnati Bell filed proposed revisions in its cost pools to reflect the detariffing of Customer Dialed Account Recording as required by the Commission's NATA/Centrex Reconsideration Order, 3 FCC Rcd 4385 (1988).

Comments on the revisions to Cincinnati Bell's manual may be filed no later than **November 17, 1988.** Replies should be filed by **December 1, 1988.** Comments should reference file number AAD 7-1697. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N. W., Room 812, Washington, D. C. 20554 and to International Transcription Services, Inc., 2100 M Street, N. W., Washington, D. C. 20036, (202) 857-3800.

Copies of the cost manual revisions may be obtained from International Transcription Services, Inc. Copies are also available for public inspection and copying in Room 812, 2000 L Street, N. W., Washington, D. C. 20554.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-503

In the Matter of

Elimination of FCC Form 901,
Monthly Form Required from
Telephone Companies

REPORT AND ORDER

Adopted: October 4, 1988; Released: October 26, 1988

By the Commission:

INTRODUCTION

1. On July 16, 1987, we adopted a Report and Order, CC Docket No. 86-182 (*ARMIS Order*) [1] requiring, among other things, automated reports of the Uniform System of Accounts (USOA), jurisdictional separations, and access data by all Tier 1 local exchange carriers (LECs) and automated reporting of USOA data by the larger non-Tier 1 Class A LECs.[2] Pursuant to the *ARMIS Order*, summary reports must be submitted on a quarterly basis, beginning June 30, 1988, and more detailed reports are required once a year. We also directed the Common Carrier Bureau (the Bureau) staff to review existing reporting requirements for the purpose of evaluating their relationship to automated filings and determining whether such reporting requirements remain necessary for our regulated activities.[3]

2. The current requirements governing the filing of Form 901 reports[4] require each telephone common carrier which had operating revenues in excess of100 million for the preceding year to file such reports on a monthly basis. Pursuant to these requirements, the American Telephone and Telegraph Company (AT&T) and forty of the largest exchange carriers file the forms electronically with the Commission by dial-up computer links. Also, Communications Satellite Corporation (Comsat) files a hard copy monthly report that is designated as a Form 901. After we accumulate three monthly reports, we publish a quarterly summary of the telephone companies.

3. Form 901 is based upon old Part 31 of our rules. In contrast, the USOA,[5] which telephone companies must use to record their operating results, is currently contained in Part 32 of our rules which replaced Part 31. In order to accommodate a dynamic telecommunications industry, there is not a one-to-one correspondence between the accounts in Part 32 and the accounts in the old Part 31; Part 32 was developed to be more applicable to the present and future state of the industry. Given the discrepancy between these formats, the Bureau adopted an order waiving the filing of Form 901 for 1988.[6]

4. In the Notice of Proposed Rule Making in this proceeding[7] we noted that the new *ARMIS Order* reporting requirements contain similar, yet far more comprehensive information than is currently contained in the Form 901. Accordingly, we tentatively concluded that eliminating Form 901 would further our goals of reducing unnecessary regulatory paperwork. Because the new ARMIS reporting system does not presently include information from AT&T, we proposed developing a format for quarterly reports from AT&T that would replace the information now received from AT&T on Form 901. We also proposed reducing Comsat's reporting burdens by requiring quarterly, rather than monthly, reports.

5. Comments were filed by AT&T; Ameritech Operating Companies (Ameritech); Bell Atlantic Telephone Companies (Bell Atlantic); Bell South Corporation and its telephone subsidiaries (BellSouth); Comsat; GTE Telephone Companies (GTE); Mountain States Telephone, Northwestern Bell and Pacific Northwest Bell (US West); NYNEX Telephone Companies (NYNEX); Pacific and Nevada Bell (Pacific); Southern New England Telephone Company (SNET); and United States Telephone Association (USTA). Reply comments were filed by AT&T and USTA.

SUMMARY OF COMMENTS

6. All of the commenters favor elimination of the Monthly Form 901 reports. Most respondents describe the problems with Form 901 and its incompatibility with the new Part 32.[8] Every commenter, except AT&T and Comsat, discusses the redundancy of Form 901 with the ARMIS data submissions now in effect for the LECs.[9] Commenters also indicate that if we were to require a new monthly Form 901, modified to reflect Part 32, we would be creating additional burdens without any corresponding benefits.[10] A few commenters suggest we move expeditiously to eliminate or review and reduce our other reports.[11] GTE also suggests that there be no requirement for filing Form 901 after the December 1987 reports are filed.

7. AT&T favors the elimination of its Form 901. AT&T suggests that we permit it to file, in lieu of those reports, equivalent financial data on a quarterly basis. AT&T provides a sample proposed report which shows its total company revenues, expenses, taxes, investments and reserves. However, AT&T alleges that a full ARMIS-type of report, modified to reflect AT&T's operations as an interexchange carrier, would provide proprietary information, which, if publicly disclosed, would cause AT&T competitive harm.[12] Although all of the commenters support the elimination of the Form 901 reports, GTE proposes that we require AT&T to continue to file such reports "until such time that the Commission develops and adopts a new report format for AT&T."[13] GTE also suggests that we make available for public comment any proposed AT&T reporting requirement prior to its implementation. GTE reserves comment on the timing and content of the new AT&T reporting requirements until such time as the new requirements are proposed. BellSouth and US West suggest that AT&T's replacement report be similar to the overall scope of those of the LECs, although reflecting AT&T's operations as an interexchange carrier.

8. In its reply comments, AT&T recommends that we reject GTE's proposal to require AT&T to submit 901 reports until we develop and adopt a new quarterly report for AT&T. AT&T bases its recommendation on the accounting changes reflected in the new USOA and the

burden that AT&T would incur if required to develop systems to accommodate that format under Part 32 accounting for a report that would be used for only a few months. Using similar reasoning, AT&T also suggests that we should not require them to modify and provide their MR series of internal management reports.[14] In lieu of these monthly filings, AT&T recommends that we permit it to submit, on a quarterly basis, the data in the reporting form included as Attachment A to its comments.

9. USTA, in its reply comments, observes that no affected carrier (other than AT&T) offered to provide less information than it provides under Part 31 of our Rules. While no one opposed the ultimate elimination of Form 901 for AT&T, USTA suggests that the comments express general support for our tentative proposal to implement an automated reporting system for AT&T comparable to that being put in place for the affected LECs.

DISCUSSION

10. As noted in the *NPRM*, the new quarterly ARMIS submissions, required from the LECs, contain far more detail than our present Form 901 report. The ARMIS data are required at both the company and study area levels,[15] whereas the Form 901 contains only data tabulated at the company level. Form 901 has been used mostly for generalized tracking of company and industry variations. The new ARMIS submissions are designed to fulfill additional needs such as monitoring revenue requirements, regulated and nonregulated cost allocations, jurisdictional separations, rate of return, and access charge allocations. No reasons have been given to challenge our tentative conclusion that Form 901 should be eliminated for the LECs. Moreover, the record demonstrates that continuation of the Form 901 reports imposes burdens upon carriers without corresponding benefits. Given these factors, we eliminate the requirement that AT&T and the LEC's file the monthly Form 901.[16]

11. Comsat's monthly report is not affected by the new USOA. We established reporting requirements for Comsat in CC Docket No. 80-634.[17] Pursuant to that order, Comsat provides monthly submissions. We observed in that proceeding that "it ultimately may prove unnecessary for Comsat to engage in the laborious process of assembling and collating the data on these schedules on a monthly basis".[18] No comments were adverse to reducing Comsat's reporting frequency to a quarterly submission. We therefore see no reason to change our tentative decision to reduce Comsat's reporting burdens by requiring quarterly, rather than monthly, reports. Initial reports covering the first two quarters of 1988 shall be filed within forty five (45) days of the release of this order. Additional quarterly reports will be due three months after a quarter ends. The format for the Comsat reports may require some revision in light of subsequent developments and experience. We accordingly authorize the Chief of the Common Carrier Bureau to adopt appropriate changes in the format of the Comsat reports.

12. As mentioned earlier, all commenters favor eliminating monthly reporting generally and replacing it with quarterly submissions. A number of comments addressed a replacement reporting format for AT&T. In the *NPRM*, we proposed to have the Chief of the Common Carrier Bureau develop a quarterly report for AT&T, and in the interim have AT&T continue to submit its monthly MR series of internal management reports.[19] AT&T suggested that we not require them to modify and provide their MR series of reports in accordance with Part 32 and instead they should be allowed to file an alternative set of data. However, in response to a letter from the Chief of the Common Carrier Bureau,[20] AT&T has been providing monthly MR reports, modified to reflect the new USOA, which show a condensed balance sheet and income statement, and revenue and expense elements. We are not altering the MR reporting requirement or format at this time. Parallel reporting should enable us to eliminate any reporting inconsistencies or difficulties that may develop with AT&T's new quarterly reports. We conclude that MR reports should be reassessed after we receive a year's worth of quarterly submissions. We accordingly authorize the Chief of the Common Carrier Bureau to modify or eliminate this set of MR reports at that time.

13. Although we did not adopt an automated quarterly report for AT&T in our *ARMIS Order*, we stated, in the *ARMIS NPRM*,[21] that we intended to establish automated reports for certain interexchange carriers at some future date. We see a number of reasons, beyond our obvious need to replace the data on AT&T's Form 901, to require as soon as possible quarterly report for AT&T resembling the ARMIS Quarterly Report adopted for the LECs. First, we need a quarterly report which displays AT&T's cost allocations between its regulated and nonregulated activities. The *Joint Cost Order*, [22] directed the Common Carrier Bureau to develop reports to collect the results of applying the requirements of the cost allocation manuals in CC Docket 86-182. It also directed the companies to hire an independent auditor to certify the results reported to the FCC. We believe that it is important to implement the reporting requirements of the *Joint Cost Order* as quickly as possible to ensure adequate reporting of cost allocations. Second, the recent replacement of Part 31 with Part 32 (USOA), Part 67 with Part 36 (Jurisdictional Separations Procedures), and the revision of Part 69 (Access Charges) warranted reviewing all of the reports we require of AT&T. The *ARMIS Order* established a series of integrated automated reports intended to enhance our ability to monitor industry activities and, at the same time, to minimize the burden on the carriers. We continue to believe that the requirement that carriers file a relatively small number of integrated automated reports is far more useful to the Commission, and ultimately less burdensome on the carriers than it would be to require the carriers to update all of our currently existing reports. Third, we believe that adaptation of the *ARMIS Order* Quarterly report for AT&T is straightforward.

14. We therefore believe that the attached ARMIS quarterly report for AT&T (Appendix A) can be implemented rapidly, and that collection of the data necessary to address a number of our regulatory concerns in a unified report will minimize the reporting burden imposed on AT&T. Initial reports covering the first two quarters of 1988 shall be filed within forty five (45) days of the release of this order. Additional quarterly reports will be due three months after a quarter ends. The format of the AT&T report may require some revision in light of subsequent developments and experience. We accordingly authorize the Chief of the Common Carrier Bureau to identify and adopt appropriate changes in the format of the AT&T reports. Additionally, we authorize the Chief of the Common Carrier Bureau to determine and revise, if necessary, the format and media of the automated report-

ing requirements consistent with the methodology and requirements implemented for the LECs in the *ARMIS Order*.[23]

15. Although we have temporarily merged the MTS and WATS categories for rate of return enforcement purposes, the order in CC Docket 86-127 requires separate reporting of the ICAM categories. On January 27, 1987, AT&T petitioned us to modify ICAM to merge these categories, and on February 5, 1987, AT&T filed for reconsideration of the CC Docket 86-127 order to permit AT&T to report combined MTS/WATS earnings.

16. Pending action on these petitions, AT&T will be allowed to report the MTS and WATS categories on an aggregated basis (Appendix A, Column L). If a need develops for more detailed information on any individual categories, we will request such data at that time. In addition, if we choose not to adopt the combined MTS/WATS reporting as requested in AT&T's Petitions, AT&T shall be required to furnish amended reports separating out the MTS and WATS categories.

17. We reject GTE's suggestion that we invite further comment on AT&T's new report. Carriers have already had the opportunity to comment on the appropriate requirements for such a report in the instant proceeding. Based on the record now before us, we have developed a new report. Inviting additional comments on the AT&T report would unnecessarily delay the initial filings.

18. We believe that the reporting requirements adopted as a result of this Order address AT&T's concerns regarding the proprietary nature of the information that will be filed with us. The reporting requirements are carefully tailored to address our already established regulatory needs and should not raise any problems of confidentiality. Those areas in which detailed information is required are fully subject to regulation and the issue of competitive advantage will only arise in special circumstances.

19. In addition, our existing rules set forth procedures by which carriers may obtain confidential treatment of proprietary filings. Those rules provide that information subject to such a request will not be released until the person making the request has had an opportunity to present its arguments against disclosure.[24] We will weigh the considerations favoring disclosure and non-disclosure in light of the specific factual situation when ruling on such arguments.[25] We are not persuaded that those rules will be inadequate to protect AT&T's legitimate concerns for the confidentiality of the information it submits in response to this Order.

20. Our rules also specify that when a filing mixes proprietary information which may be protected from disclosure with routinely available information, the filer must, where feasible, physically separate the assertedly protected material from other material.[26] With regard to conventional paper filings, compliance with that requirement is simple. The filing person can simply provide a separate document containing the information for which protection is sought. That procedure, however, will not be adequate for filings submitted in response to this Order. Because the utility of such filings to this Commission will be to a great extent dependent on our computers being able to read and process that information, we wish to clarify that if AT&T seeks proprietary treatment for some data, it must provide two copies of both the paper and the computer media submissions. The first copy must contain all the required information on both the paper and the computer media submissions. The second should be restricted to information which AT&T is willing to make available to the public. In addition, AT&T should prominently label the copy containing information subject to a claim of confidentiality to prevent inadvertent disclosure.

21. Quarterly reports will be due three months after a quarter ends. If the timeliness of the data creates problems, we will consider accelerating the filing of necessary information. Eliminating the Form 901 report does not preclude us from directing the affected carriers to file other detailed information should the need arise. At this time we are not ready to eliminate or reduce similar reports such as Form M and Form 492. Those reports contain additional types of information and different time periods. We believe that most of our needs for data can be adequately met with the quarterly and annual reports filed by these carriers. When necessary, special data requests can be tailored to specific needs. Previous orders observed that special data requests and studies can be conducted as needed by this Commission, and the private sector can collect data for its own needs.[27] Because there is no ongoing need for detailed monthly data, special studies will eliminate the need for telephone carriers to submit monthly reports. This will not only reduce the costs to the carriers, it will also reduce this Commission's costs.

22. This decision follows several recent Commission decisions, minimizing regulatory burdens. In Elimination of FCC Forms 903 and Form 905, Monthly Forms Required from Radiotelegraph, Ocean-Cable and Wire-Telegraph Carriers;[28] Elimination of Form P, Annual Report of Miscellaneous Common Carriers;[29] Amendment of Annual Report of Licensees in Public Mobile Radio Service;[30] and Amendment of Section 43.61 of the Commission's Rules to Update and Simplify the Required Traffic Reports filed by International Telecommunications Carriers,[31] we found Form 903, Form 905, Form P, Form L, and the semi-annual traffic reports to be unnecessary regulatory burdens and eliminated them.

23. In summary, we conclude that the costs of collecting monthly data from all of the affected telephone carriers and Comsat outweigh the benefits derived from its availability to this Commission. Alternative sources of data should satisfy our regulatory needs and if not, we have means at our disposal to obtain whatever information becomes essential.

OTHER MATTERS

24. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to reduce information collection requirements on the public. This request for information is not subject to Section 3507 of that Act.

25. We certify that the Regulatory Flexibility Act,[32] is not applicable to the rule changes we are adopting in this proceeding. As part of our analysis of the proposal described in this Order, however, this Commission has considered the impact of the proposal on small telephone companies. *i. e.*, those serving 50,000 or fewer access lines.[33] Our amendments will have a beneficial economic impact on large telephone companies only (annual revenues in excess of100 million) because they are the only companies subject to these rules. The amendments eliminate record keeping and reporting requirements applicable to such companies.

ORDERING CLAUSES

26. IT IS ORDERED, that pursuant to the provisions of Section 4(i), 219, 403 and 404 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 219, 403 and 404, FCC Form 901, Monthly Reports of telephone carriers, is eliminated, effective with the monthly reports for calendar year 1988.

27. IT IS FURTHER ORDERED, that Parts 1 and 43 of the FCC Rules and Regulations are amended as set forth in Appendix B below effective **October 31, 1988.**

28. IT IS FURTHER ORDERED, that this proceeding is hereby terminated.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), CC Docket No. 86-182, 2 FCC Rcd 5770 (1987) (*ARMIS Order), petitions for recon. pending.*

[2] Tier 1 carriers consist of all LECs earning 100 million or more annually in revenue from regulated telecommunications services for five consecutive years. (Public Notice, Monitoring Plan, Mimeo No. 2133 at para. 7 (released January 25, 1985)). Class A companies are defined in Part 32 as all telephone companies with annual telecommunications operating revenues of100 million or more. 47 C.F.R. § 32.01(01).

[3] *See ARMIS Order, supra*, at para. 51.

[4] 47 C.F.R. §§ 1.786, 43.31 (1987).

[5] *See* Revision of the Uniform System of Accounts for Class A and Class B Telephone Companies, CC Docket 78-196, 51 Fed. Reg. 43498 (December 2, 1986) which became effective January 1, 1988.

[6] Waiver of FCC Form 901, Monthly Form Required from Telephone Companies, Memorandum Opinion and Order, FCC 88-86, 3 FCC Rcd 567 (1988).

[7] Elimination of FCC Form 901, Monthly Form Required from Telephone Companies, FCC 87-349, released December 2, 1987 (*NPRM).*

[8] *See , e. g.,* Comments of AT&T, Bell Atlantic, Bell South, GTE, Pacific, SNET and USTA.

[9] *See, e. g.,* Comments of Ameritech, Pacific, SNET and USTA.

[10] *See, e. g.,* Comments of Ameritech, p. 2 (Commission will have to modify its software); Bell Atlantic, p. 2 (burden without regulatory purpose); GTE, p. 3 (burden with no purpose); and US West, p. 2 (duplicative data).

[11] *See, e. g.,* Comments of SNET, p. 3 (Form 492) and US West, p. 3 (Form 492 and Form M).

[12] AT&T indicated that it would be willing to discuss the format and content of information that it could provide to us on a proprietary basis without incurringan undue burden.

[13] *See* Comments of GTE, p. 3.

[14] *See* AT&T reply comments, p. 2, Footnote ****.

[15] A study area usually consists of a telephone company's service territory in a given state, although telephone companies occasionally have more than one study area in a particular state.

[16] Sections 1.786 and 43.31 of our Rules are founded upon Section 219(b) of the Communications Act, which gives us discretionary authority to require monthly reports. No section of the Communications Act requires us to receive monthly reports from the telephone carriers.

[17] *See* Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, Report and Order, FCC 85-178, released April 19, 1985.

[18] *Id.* at p: a. 17.

[19] *See NPRM*, para. 12 and footnote 11.

[20] *See* Letter from Gerald Brock, Chief, Common Carrier Bureau to D.J. Culkin, Corporate Vice President, American Telephone and Telegraph Company, dated April 7, 1988.

[21] Automated Reporting Requirements for certain Class A and Tier 1 Telephone Companies (Part 31, 43, 67, and 69 of the FCC's Rules), Notice of Proposed Rule Making, FCC 86-227, released May 7, 1986, at 2, n.2, 51 Fed. Reg. 18463 (May 20, 1986).

[22] Separations of Costs of Regulated Telephone Service From Costs of Nonregulated Activities, Report and Order, CC Docket 86-111, 2 FCC Rcd 1298 (1987); *affirmed on reconsideration*, 2 FCC Rcd 6283 (1987), *further reconsideration pending.*

[23] *See ARMIS Order*, supra, at para 23.

[24] 47 C.F.R. Section 0.461 (h)(1).

[25] 47 C.F.R. Section 0.461 (f).

[26] 47 C.F.R. Section 0.459 (a).

[27] *See* Elimination of FCC Form 903 and Form 905, Monthly Forms Required From Radiotelegraph, Ocean-Cable, and Wire-Telegraph Carriers, CC Docket 86-368, 1 FCC Rcd 1349 (1986).

[28] *Id.* at para. 12.

[29] *See* Elimination of Annual Report of Miscellaneous Common Carriers (Form P), CC Docket No. 83-1291, FCC No. 84-74 (released March 8, 1984), 49 Fed. Reg. 10121 (March 19, 1984).

[30] *See* Amendment of Annual Report of Licensees in Public Mobile Radio Services (FCC Form L), CC Docket No. 82-85, FCC No. 82-451 (released October 27, 1982), *reconsidered*, FCC 83-142 (released April 19, 1983).

[31] *See* Amendment of Section 43.61 of the Commission's Rules to Update and Simplify the Required Traffic Data Reports Filed by International Telecommunications Carriers, CC Docket No. 79-262, FCC No. 85-219 (released May 15, 1985), 50 Fed. Reg. 21607 (May 28, 1985).

[32] 5 U.S.C. § 601, *et seq.* (1980).

[33] Because of the nature of local exchange and access service, this Commission concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

TABLE I - COST AND REVENUE TABLE APPENDIX A

Carrier _____ for the Period _____

(Dollars in Thousands)

Line No.	ITEM (a)	TOTAL (b)	NON-REG (c)	OTHER ADJUSTMENTS (d)	SUBJECT TO SEPARATIONS (e=b-c-d)
	REVENUES				
122	Long Distance Message				
124	AT&T 800				
125	AT&T WATS				
126	Private Line				
128	Other Long Distance				
130	Miscellaneous Operating				
	Less:				
129	Settlements				
150	Uncollectibles				
190	NET REVENUES				
	EXPENSES				
200	Plant Specific				
210	Plant Non-Specific				
220	Customer Operations - Marketing				
230	Customer Operations - Services:				
233	Billing & Collection				
236	Other				
240	Access:				
242	Carrier Common Line				
244	Traffic Sensitive Switched				
246	Special				
248	Billing & Collection				
250	Corporate Operations				
270	Other Expenses				
320	Depreciation/Amortization				
280	FCC Adjustments				
350	TOTAL OPERATING EXPENSES				
	NONOPERATING ITEMS				
140	AFUDC				
143	Special Charges				
275	Extraordinary Items				
146	TOTAL NONOPERATING ITEMS				
	OTHER TAXES				
360	State/Local Income				
370	Other State/Local				
380	TOTAL OTHER TAXES				
	FIT				
410	Fixed Charges				
400	IRS Income Adjustment				
430	FCC Taxable Income Adjustment				
420	ITC Amortization				
440	FCC ITC Adjustment				
500	Net FIT				
550	TOTAL EXPENSES AND TAXES				

ORDERING CLAUSES

26. IT IS ORDERED, that pursuant to the provisions of Section 4(i), 219, 403 and 404 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 219, 403 and 404, FCC Form 901, Monthly Reports of telephone carriers, is eliminated, effective with the monthly reports for calendar year 1988.

27. IT IS FURTHER ORDERED, that Parts 1 and 43 of the FCC Rules and Regulations are amended as set forth in Appendix B below effective **October 31, 1988.**

28. IT IS FURTHER ORDERED, that this proceeding is hereby terminated.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), CC Docket No. 86-182, 2 FCC Rcd 5770 (1987) (*ARMIS Order*), *petitions for recon. pending.*

[2] Tier 1 carriers consist of all LECs earning 100 million or more annually in revenue from regulated telecommunications services for five consecutive years. (Public Notice, Monitoring Plan, Mimeo No. 2133 at para. 7 (released January 25, 1985)). Class A companies are defined in Part 32 as all telephone companies with annual telecommunications operating revenues of100 million or more. 47 C.F.R. § 32.01(01).

[3] *See ARMIS Order*, *supra*, at para. 51.

[4] 47 C.F.R. §§ 1.786, 43.31 (1987).

[5] *See* Revision of the Uniform System of Accounts for Class A and Class B Telephone Companies, CC Docket 78-196, 51 Fed. Reg. 43498 (December 2, 1986) which became effective January 1, 1988.

[6] Waiver of FCC Form 901, Monthly Form Required from Telephone Companies, Memorandum Opinion and Order, FCC 88-86, 3 FCC Rcd 567 (1988).

[7] Elimination of FCC Form 901, Monthly Form Required from Telephone Companies, FCC 87-349, released December 2, 1987 (*NPRM*).

[8] *See* , *e. g.*, Comments of AT&T, Bell Atlantic, Bell South, GTE, Pacific, SNET and USTA.

[9] *See, e. g.*, Comments of Ameritech, Pacific, SNET and USTA.

[10] *See, e. g.*, Comments of Ameritech, p. 2 (Commission will have to modify its software); Bell Atlantic, p. 2 (burden without regulatory purpose); GTE, p. 3 (burden with no purpose); and US West, p. 2 (duplicative data).

[11] *See, e. g.*, Comments of SNET, p. 3 (Form 492) and US West, p. 3 (Form 492 and Form M).

[12] AT&T indicated that it would be willing to discuss the format and content of information that it could provide to us on a proprietary basis without incurringan undue burden.

[13] *See* Comments of GTE, p. 3.

[14] *See* AT&T reply comments, p. 2, Footnote ****.

[15] A study area usually consists of a telephone company's service territory in a given state, although telephone companies occasionally have more than one study area in a particular state.

[16] Sections 1.786 and 43.31 of our Rules are founded upon Section 219(b) of the Communications Act, which gives us discretionary authority to require monthly reports. No section of the Communications Act requires us to receive monthly reports from the telephone carriers.

[17] *See* Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, Report and Order, FCC 85-178, released April 19, 1985.

[18] *Id.* at p: a.-17.

[19] *See NPRM*, para. 12 and footnote 11.

[20] *See* Letter from Gerald Brock, Chief, Common Carrier Bureau to D.J. Culkin, Corporate Vice President, American Telephone and Telegraph Company, dated April 7, 1988.

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[22] Separations of Costs of Regulated Telephone Service From Costs of Nonregulated Activities, Report and Order, CC Docket 86-111, 2 FCC Rcd 1298 (1987); *affirmed on reconsideration*, 2 FCC Rcd 6283 (1987), *further reconsideration pending.*

[23] *See ARMIS Order*, supra, at para 23.

[24] 47 C.F.R. Section 0.461 (h)(1).

[25] 47 C.F.R. Section 0.461 (f).

[26] 47 C.F.R. Section 0.459 (a).

[27] *See* Elimination of FCC Form 903 and Form 905, Monthly Forms Required From Radiotelegraph, Ocean-Cable, and Wire-Telegraph Carriers, CC Docket 86-368, 1 FCC Rcd 1349 (1986).

[28] *Id.* at para. 12.

[29] *See* Elimination of Annual Report of Miscellaneous Common Carriers (Form P), CC Docket No. 83-1291, FCC No. 84-74 (released March 8, 1984), 49 Fed. Reg. 10121 (March 19, 1984).

[30] *See* Amendment of Annual Report of Licensees in Public Mobile Radio Services (FCC Form L), CC Docket No. 82-85, FCC No. 82-451 (released October 27, 1982), *reconsidered*, FCC 83-142 (released April 19, 1983).

[31] *See* Amendment of Section 43.61 of the Commission's Rules to Update and Simplify the Required Traffic Data Reports Filed by International Telecommunications Carriers, CC Docket No. 79-262, FCC No. 85-219 (released May 15, 1985), 50 Fed. Reg. 21607 (May 28, 1985).

[32] 5 U.S.C. § 601, *et seq.* (1980).

[33] Because of the nature of local exchange and access service, this Commission concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

TABLE I - COST AND REVENUE TABLE APPENDIX A

Carrier _____ for the Period _____

(Dollars in Thousands)

Line No.	ITEM (a)	TOTAL (b)	NON-REG (c)	OTHER ADJUSTMENTS (d)	SUBJECT TO SEPARATIONS (e=b-c-d)
	REVENUES				
122	Long Distance Message				
124	AT&T 800				
125	AT&T WATS				
126	Private Line				
128	Other Long Distance				
130	Miscellaneous Operating				
	Less:				
129	Settlements				
150	Uncollectibles				
190	NET REVENUES				
	EXPENSES				
200	Plant Specific				
210	Plant Non-Specific				
220	Customer Operations - Marketing				
230	Customer Operations - Services:				
233	Billing & Collection				
236	Other				
240	Access:				
242	Carrier Common Line				
244	Traffic Sensitive Switched				
246	Special				
248	Billing & Collection				
250	Corporate Operations				
270	Other Expenses				
320	Depreciation/Amortization				
280	FCC Adjustments				
350	TOTAL OPERATING EXPENSES				
	NONOPERATING ITEMS				
140	AFUDC				
143	Special Charges				
275	Extraordinary Items				
146	TOTAL NONOPERATING ITEMS				
	OTHER TAXES				
360	State/Local Income				
370	Other State/Local				
380	TOTAL OTHER TAXES				
	FIT				
410	Fixed Charges				
400	IRS Income Adjustment				
430	FCC Taxable Income Adjustment				
420	ITC Amortization				
440	FCC ITC Adjustment				
500	Net FIT				
550	TOTAL EXPENSES AND TAXES				

TABLE I - COST AND REVENUE TABLE

Page 1.2

Carrier _____ for the Period _____

(Dollars in Thousands)

Line No.	ITEM (a)	STATE (f)	TOTAL (g=e-f)	INTERSTATE EXCLUDED SVCS (h)	ADJ. INTERSTATE (i=g-h)
	REVENUES				
122	Long Distance Message				
124	AT&T 800				
125	AT&T WATS				
126	Private Line				
128	Other Long Distance				
130	Miscellaneous Operating				
	Less:				
129	Settlements				
150	Uncollectibles				
190	NET REVENUES				
	EXPENSES				
200	Plant Specific				
210	Plant Non-Specific				
220	Customer Operations - Marketing				
230	Customer Operations - Services:				
233	Billing & Collection				
236	Other				
240	Access:				
242	Carrier Common Line				
244	Traffic Sensitive Switched				
246	Special				
248	Billing & Collection				
250	Corporate Operations				
270	Other Expenses				
320	Depreciation/Amortization				
280	FCC Adjustments				
350	TOTAL OPERATING EXPENSES				
	NONOPERATING ITEMS				
140	AFUDC				
143	Special Charges				
275	Extraordinary Items				
146	TOTAL NONOPERATING ITEMS				
	OTHER TAXES				
360	State/Local Income				
370	Other State/Local				
380	TOTAL OTHER TAXES				
	FIT				
410	Fixed Charges				
400	IRS Income Adjustment				
430	FCC Taxable Income Adjustment				
420	ITC Amortization				
440	FCC ITC Adjustment				
500	Net FIT				
550	TOTAL EXPENSES AND TAXES				

TABLE I - COST AND REVENUE TABLE

Carrier _____ for the Period _____ Page 1.3

(Dollars in Thousands)

Line No.	ITEM (a)	PRIOR PERIOD AD (j)	INTERSTATE NORMALIZED (k=i-j)	INTERSTATE PUBLIC SWITCHED (l)	INTERSTATE PRIVATE LINE (m)
	REVENUES				
122	Long Distance Message				
124	AT&T 800				
125	AT&T WATS				
126	Private Line				
128	Other Long Distance				
130	Miscellaneous Operating				
	Less:				
129	Settlements				
150	Uncollectibles				
190	NET REVENUES				
	EXPENSES				
200	Plant Specific				
210	Plant Non-Specific				
220	Customer Operations - Marketing				
230	Customer Operations - Services:				
233	Billing & Collection				
236	Other				
240	Access:				
242	Carrier Common Line				
244	Traffic Sensitive Switched				
246	Special				
248	Billing & Collection				
250	Corporate Operations				
270	Other Expenses				
320	Depreciation/Amortization				
280	FCC Adjustments				
350	TOTAL OPERATING EXPENSES				
	NONOPERATING ITEMS				
140	AFUDC				
143	Special Charges				
275	Extraordinary Items				
146	TOTAL NONOPERATING ITEMS				
	OTHER TAXES				
360	State/Local Income				
370	Other State/Local				
380	TOTAL OTHER TAXES				
	FIT				
410	Fixed Charges				
400	IRS Income Adjustment				
430	FCC Taxable Income Adjustment				
420	ITC Amortization				
440	FCC ITC Adjustment				
500	Net FIT				
550	TOTAL EXPENSES AND TAXES				

TABLE I - COST AND REVENUE TABLE

Page 2.1

Carrier _____ for the Period _____

(Dollars in Thousands)

Line No.	ITEM (a)	TOTAL (b)	NON-REG (c)	OTHER ADJUSTMENTS (d)	SUBJECT TO SEPARATIONS (e=b-c-d)
	PLANT-IN-SERVICE				
600	Support Plant				
610	COE Switching				
620	COE Transmission				
630	Cable & Wire				
640	Information				
650	Amortizable Assets				
690	TOTAL PLANT-IN SERVICE				
	OTHER INVESTMENTS				
700	Plant Held for Future Use				
710	Plant Under Construction				
720	Plant Acquisition Adjustment				
730	Other Deferred Charges				
740	Material & Supplies				
750	Cash Working Capital				
760	FCC Investment Adjustment				
790	TOTAL OTHER INVESTMENTS				
	RESERVES				
800	Depreciation				
810	Amortization				
820	Deferred FIT				
830	Customer Deposits				
850	Other Reserves				
840	FCC Reserve Adjustment				
890	TOTAL RESERVES				
	RETURN DATA				
590	Net Return				
900	Average Net Investment				
910	Rate of Return (Annualized)				
920	FCC Ordered Refund				
930	Net Return (including FCC refund)				
940	Rate of Return (including refund)				
	RETURN DATA - CUMULATIVE				
595	Net Return				
905	Average Net Investment				
915	Rate of Return (Annualized)				
925	FCC Ordered Refund				
935	Net Return (including FCC refund)				
945	Rate of Return (including refund)				

TABLE I - COST AND REVENUE TABLE

Carrier _____ for the Period _____

(Dollars in Thousands)

Line No.	ITEM (a)	STATE (f)	TOTAL (g=e-f)	INTERSTATE EXCLUDED SVCS (h)	ADJ. INTERSTATE (i=g-h)
	PLANT-IN-SERVICE				
600	Support Plant				
610	COE Switching				
620	COE Transmission				
630	Cable & Wire				
640	Information				
650	Amortizable Assets				
690	TOTAL PLANT-IN SERVICE				
	OTHER INVESTMENTS				
700	Plant Held for Future Use				
710	Plant Under Construction				
720	Plant Acquisition Adjustment				
730	Other Deferred Charges				
740	Material & Supplies				
750	Cash Working Capital				
760	FCC Investment Adjustment				
790	TOTAL OTHER INVESTMENTS				
	RESERVES				
800	Depreciation				
810	Amortization				
820	Deferred FIT				
830	Customer Deposits				
850	Other Reserves				
840	FCC Reserve Adjustment				
890	TOTAL RESERVES				
	RETURN DATA				
590	Net Return				
900	Average Net Investment				
910	Rate of Return (Annualized)				
920	FCC Ordered Refund				
930	Net Return (including FCC refund)				
940	Rate of Return (including refund)				
	RETURN DATA - CUMULATIVE				
595	Net Return				
905	Average Net Investment				
915	Rate of Return (Annualized)				
925	FCC Ordered Refund				
935	Net Return (including FCC refund)				
945	Rate of Return (including refund)				

TABLE I - COST AND REVENUE TABLE

Page 2.3

Carrier _____ for the Period _____

(Dollars in Thousands)

Line No.	ITEM (a)	INTERSTATE PRIOR PERIOD AD (j)	NORMALIZED (k=i-j)	PUBLIC SWITCHED (l)	PRIVATE LINE (m)
	PLANT-IN-SERVICE				
600	Support Plant				
610	COE Switching				
620	COE Transmission				
630	Cable & Wire				
640	Information				
650	Amortizable Assets				
690	TOTAL PLANT-IN SERVICE				
	OTHER INVESTMENTS				
700	Plant Held for Future Use				
710	Plant Under Construction				
720	Plant Acquisition Adjustment				
730	Other Deferred Charges				
740	Material & Supplies				
750	Cash Working Capital				
760	FCC Investment Adjustment				
790	TOTAL OTHER INVESTMENTS				
	RESERVES				
800	Depreciation				
810	Amortization				
820	Deferred FIT				
830	Customer Deposits				
850	Other Reserves				
840	FCC Reserve Adjustment				
890	TOTAL RESERVES				
	RETURN DATA				
590	Net Return				
900	Average Net Investment				
910	Rate of Return (Annualized)				
920	FCC Ordered Refund				
930	Net Return (including FCC refund)				
940	Rate of Return (including refund)				
	RETURN DATA - CUMULATIVE				
595	Net Return				
905	Average Net Investment				
915	Rate of Return (Annualized)				
925	FCC Ordered Refund				
935	Net Return (including FCC refund)				
945	Rate of Return (including refund)				

TABLE II - DEMAND ANALYSIS TABLE

Carrier _____ for the Period _____

Total Public Switched Network Switched Messages and Minutes of Use (in thousands)

Line No.	ITEM (a)	MESSAGES (b)	MONTH 1 CONVERSATION MINUTES (c)	ACCESS MINUTES (d)
	MTS			
2200	Intrastate			
2210	Domestic Interstate & Overseas			
2220	International			
	AT&T 800			
2230	Intrastate			
2240	Domestic Interstate & Overseas			
2250	International			
	AT&T WATS			
2260	Intrastate			
2270	Domestic Interstate & Overseas			
2280	International			
			MONTH 2	
	MTS			
2300	Intrastate			
2310	Domestic Interstate & Overseas			
2320	International			
	AT&T 800			
2330	Intrastate			
2340	Domestic Interstate & Overseas			
2350	International			
	AT&T WATS			
2360	Intrastate			
2370	Domestic Interstate & Overseas			
2380	International			
			MONTH 3	
	MTS			
2400	Intrastate			
2410	Domestic Interstate & Overseas			
2420	International			
	AT&T 800			
2430	Intrastate			
2440	Domestic Interstate & Overseas			
2450	International			
	AT&T WATS			
2460	Intrastate			
2470	Domestic Interstate & Overseas			
2480	International			

CERTIFICATION

I certify that I am an officer of _____; that I have examined the foregoing report and that to the best of my knowledge, information and belief, all statements of fact contained in this report are true and that said report is an accurate statement of the affairs of the above named respondent in respect to the data set forth herein for the period from _____ to _____.

PRINTED NAME _____

POSITION _____

SIGNATURE _____

DATE _____

(Persons making wilful false statements in this report form can be punished by fine or imprisonment under the Communications Act, 47 U.S.C. 220 (e).)

CONTACT PERSON _____

TELEPHONE NUMBER _____

APPENDIX B

Parts 1 and 43 of the Code of Federal Regulations are amended as follows:

1. Authority citation for Part 1 continues to read:

Authority: Secs. 4.303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Part 1 is amended by removing § 1.786.

3. Authority citation for Part 43 continues to read:

Authority: Section 4, 48 Stat. 1966, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply Secs. 211, 219, 48 Stat. 1073, 1077, as amended; 47 U.S.C. 211, 219, 220.

4. Part 43 is amended by removing § 43.31.

5. Section 43.22 is amended by designating the current paragraph as paragraph (a) and adding new paragraph (b) as follows:

§ 43.22 Quarterly reports of communication common carriers.

(a) ***

(b) Each designated interstate carrier with operating revenues for the preceding year of100 million or more shall file, by March 31, June 30, September 30, and December 31 of each year, a report showing for the previous calendar quarter its revenues, expenses, taxes, plant in service, other investment and depreciation reserves, and such other data as is required by the Commission on computer media prescribed by the Commission. The total operating results shall be allocated between regulated and nonregulated operations, and the regulated data shall be further divided into the following categories: State and interstate, and the interstate will be further divided into the major services.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

CELLULAR TELEPHONE COMPANY

For a Declaratory Ruling that Nonwireline Cellular Carriers should not be required to provide Resale Service to Wireline Cellular Carriers in the Same Market

MEMORANDUM OPINION AND ORDER

Adopted: October 3, 1988; Released: October 7, 1988

By the Commission:

1. Cellular Telephone Company (CTC), the nonwireline licensee in the New York City Metropolitan Statistical Area (MSA),[1] has filed an Application for Review of the Common Carrier Bureau's letter of April 17, 1986,[2] in which the Bureau concluded that CTC must offer cellular resale capacity to NYNEX Mobile Communications Retail Company (NYNEX-R). [3] The United States Department of Justice (DOJ) filed comments supporting CTC; NYNEX-R filed oppositions to the CTC and DOJ pleadings. For the reasons indicated below, we conclude that CTC must offer resale capacity to NYNEX-R.

BACKGROUND

2. On March 14, 1986, CTC filed a letter petition requesting a declaratory ruling permitting it to refuse to provide resale service to NYNEX-R. CTC argued that such action would serve to enhance competition and further the objectives of the antitrust laws. It maintained that the underlying policy considerations of the Commission's pro-resale policies did not apply in this case, and that competition would be injured if CTC were required to allow NYNEX-R to resell on its system. NYNEX-R responded that the Commission's cellular resale policies are applicable to this situation and that CTC's competitive injury arguments were speculative and not supported by the facts.

3. The Bureau, in its letter to CTC, concluded that CTC must provide resale service to NYNEX-R. Relying on policies enunciated in the *Cellular Report and Order*,[4] and the *Resale and Shared Use Decision*,[5] the Bureau found that: restrictions on resale were contrary to the public interest; the Commission had not limited the resale requirement for any of the reasons suggested by CTC;[6] resale enhanced, rather than diminished, competition; and CTC had not demonstrated that it would be competitively injured if it were required to serve NYNEX-R.

ARGUMENTS

4. In its Application for Review, CTC argues that the Bureau has misapplied the Commission's cellular resale policies. CTC contends that the Commission's resale policy was created to mitigate the wireline carriers' "headstart" and to promote competition in the secondary market among non-facilities-based cellular providers. CTC submits that the decision to mandate resale to NYNEX-R promotes neither of these objectives. The headstart policy is inapplicable to resale of nonwireline services and there are a sufficient number of independent resellers on both systems to foster a secondary resale market.

5. In addition, CTC argues that the Bureau erred in its resolution of CTC's competitive market structure arguments. CTC identifies several aspects of the NYNEX-R resale proposal that, it argues, will substantially hinder CTC's ability to compete. First, CTC claims that restrictions on resale are permissible under the antitrust laws and, in fact, are pro-competitive if they stimulate facilities-based competition. While CTC concedes that resale activity generally promotes competition in the cellular marketplace, it contends that such competition is secondary to the facilities-based competition between nonwireline and wireline cellular carriers. It concludes therefore that where, as here, facilities-based competition will be harmed by resale activities, such resale is contrary to the public interest and should not be required. Second, CTC maintains that forcing it to accept NYNEX-R as a reseller would undermine CTC's strategy of "establishing distinctive and superior channels of distribution" and "hinder CTC's ability to distinguish its system from [NYNEX-R's]," thereby confusing customers. Third, CTC argues that, NYNEX-R, as a reseller, would be able to obtain increased information about CTC's marketing plan that normally would not be available to it as a competitor, and similarly, that once NYNEX-R places a large customer base on the CTC system,[7] it will have the ability to injure CTC by threatening to withdraw its resale customers.

6. The DOJ supports CTC's position. The DOJ contends that the Commission's resale policy should not apply to the instant situation because the *Resale and Shared Use Decision* was aimed at encouraging entry and promoting competition with dominant or monopoly carriers, and allowing NYNEX-R to resell CTC services would not advance these goals. It also argues that allowing firms to select their distribution channels generally enhances efficiency and consumer welfare; CTC's refusal to permit NYNEX-R to resell CTC services will not harm competition; the Commission's policies should foster only facilities-based competition; and in the absence of a clear market failure, the Commission should not interfere with a carrier's business judgment.

7. NYNEX-R responds that the Communications Act and well-established Commission policies make it unlawful for a common carrier to impose restrictions on the resale of telecommunications services, including cellular services. NYNEX-R also takes issue with the CTC antitrust analysis. NYNEX-R acknowledges that antitrust law recognizes that vertical restraints may benefit competition in certain instances. It contends, however, that the restraint CTC proposes does not present the type of situation that has been argued to justify vertical restraints on competition.[8]

8. NYNEX-R also disputes that requiring CTC to resell to NYNEX-R is anticompetitive. It responds to the "superior distribution network" and "customer confusion"

arguments by noting that there are several resellers, including CTC, that market both the wireline and nonwireline cellular service, and that it has been demonstrated that sufficient product differentiation can easily be achieved through successful sales efforts. NYNEX-R also denies that it will have a sufficiently large customer base on the CTC system to achieve market power or that it would transfer its customer base in such a way so as to injure CTC. Finally, NYNEX-R disputes that sensitive and confidential information is provided to resellers, particularly where as here, resellers market both carriers' services and there are no exclusive dealerships.

DISCUSSION

9. After carefully reviewing this matter, we find that the Bureau correctly applied this Commission's resale policies and that the Bureau's determination that CTC must offer resale capacity should be affirmed. CTC has sought a change in our resale policies pursuant to a petition for declaratory ruling. However, the resale policy was adopted in the context of Rule Making proceedings and the proper mechanism for such a change is via a petition for Rule Making.

10. In the *Cellular Report and Order*, we first examined the issue of what, if any, restrictions on resale should be permitted with respect to cellular licensees. We found that restrictions on cellular resale were contrary to the public interest.[9] Relying in general on "reasons similar to those set forth in the [*Resale and Shared Use Decision*]," we prescribed unlimited resale and shared use of cellular service, stating that we would "condition radio licenses awarded to system operators such that no restrictions on resale and shared use of cellular services [would] be permitted."[10] In stating this policy in the *Cellular Report and Order*, we did not distinguish between wireline and nonwireline resale. Indeed, the Common Carrier Bureau has previously indicated that our resale policies apply to both nonwirelines and wirelines.[11] Further, in *Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 FCC 2d 167, 193 (1980), the Commission adopted a blanket prohibition of resale restrictions, concluding that such restrictions are "unjust, unreasonable, and unjustly and unreasonably discriminatory under Sections 201(b) and 202(a) of the Act."

11. CTC argues, and the DOJ concurs, that the resale requirement was intended to apply only to "those [companies] who do not own basic communications facilities" and that, in particular, resale policies for cellular service were adopted to safeguard against wireline headstart. In the *Resale and Shared Use Reconsideration Order*, we found that restrictions on resale were unlawful "whether or not the carrier owns its transmission facilities."[12] We made no distinction when applying this result to the cellular service. Similarly, although resale may be an effective tool in mitigating a headstart advantage, we did not limit our resale policy to situations which involved headstart. Indeed, the headstart issue was discussed in an entirely different section of the *Cellular Report and Order* than the section justifying our policy on resale.[13]

12. Based on the foregoing, we conclude that the Bureau correctly applied the Commission's resale policy in the instant case. Nevertheless, inasmuch as CTC and the DOJ argue that a departure from our resale policy is warranted under these or other circumstances, it may be worthwhile to review our resale policy to determine the extent to which we should continue to apply it. Because a declaratory ruling is an inappropriate forum for such an inquiry, we will treat the comments of CTC and the DOJ as petitions for Rule Making, and in a public notice released simultaneously with this order, we invite the public to comment on these filings and on any proposed changes in our resale policy that they believe the Commission should make.

ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the Application for Review filed by Cellular Telephone Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] CTC began operation of its system during April-May 1986.

[2] Letter from Deputy Chief, Mobile Services Division to counsel for CTC in response to Petition for Declaratory Ruling.

[3] NYNEX-R, a wholly-owned subsidiary of NYNEX Communications Corporation (NYNEX), sells cellular service on a retail basis in addition to selling and leasing cellular equipment. NYNEX is the managing partner of the New York SMSA Limited Parnertship (NYSLP), the wireline licensee in New York City. NYSLP has been serving subscribers in New York City since June 1984. Through resale, CTC has approximately 8,000 customers on the NYSLP system. CTC is shifting these customers to its system now that it has initiated commercial operation.

[4] *Cellular Communications Systems (Cellular Report and Order)*, 86 FCC 2d 469, 511 (1981), *modified on other grounds* 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982), *petition for review dismissed sub nom. United States v.* FCC, No. 82-1526 (D.C. Cir. March 3, 1983).

[5] Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), modified on other grounds, (Resale and Shared Use Reconsideration Order), 62 FCC 588 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F. 2d 17 (2d Cir.), *cert denied*, 439 U.S. 875 (1978).

[6] *See* para. 10, *infra*.

[7] CTC asserts that NYNEX-R has already requested significant portion of numbers allocated to CTC. NYNEX-R responds that it has purchased only 517 numbers from CTC and placed only 453 customers on the CTC system.

[8] Typically, the types of vertical restraints that have been recognized as benefiting intrabrand competition include terms in an agreement between the carrier and the reseller proposing uniformly exclusive relationships or terms proposing that a carrier's resellers adhere to a plan of territorial or customer restrictions.

[9] 86 FCC 2d at 510-511.

[10] *Id.* (footnote omitted).

[11] *See* Flint Cellular Telephone Co., Mimeo 4760, released May 28, 1986.

[12] *See* 62 FCC 2d at 600.

[13] Compare 86 FCC 2d at 510-511 with *id.* at 491 n. 57.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 85-141

In the Matter of

Amendment of the Rules Regarding
Computation of Time

ERRATUM

Released: October 20, 1988

On December 15, 1987, the Commission released a Report and Order concerning the above-captioned matter. 2 FCC Rcd 7402, 52 Fed. Reg. 49,159 (December 30, 1987). In this connection, the following corrections are made to the Report and Order:

1) The date released is corrected to read December 15, 1987.

2) The first sentence in Footnote 1 is corrected to read:

Since this provision relates to the Commission's procedural practices, prior notice and comment is not required to change the rule. *See* section 553(b)(3)(A) of the Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(A).

In addition, the following corrections are made in the Final Rule printed at the end of the Report and Order.

1) In section 1.4(b)(1), Example 3, the second sentence is removed.

2) Section 1.4(b)(4), Example 7, is corrected to read:

A Public Notice of petitions for rule making filed with the Commission is released on Wednesday, September 2, 1987; public notice of these petitions is given at 3 P.M. Eastern Standard Time September 3, 1987, the day after release. The first day to be counted in computing filing times is Friday, September 4, 1987.

3) Section 1.4(d), Example 10, is corrected by: (a) inserting the missing quotation mark at the beginning of the phrase "day after the day" in the first sentence, and

(b) changing the section cited in the second sentence to read: 1.4(b).

4) In section 1.4(d), Example 11, the next to the last sentence is corrected by deleting the quotation mark preceeding the third word (day), and inserting the missing quotation mark at the beginning of the phrase "day after the day."

5) In section 1.4(h), Example 13, the citation in the next to last sentence is corrected to read: § 1.4(c).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PAUL AND NANCY SCHUMACHER — File No. BPH-870519IC

For a Construction Permit
to Modify the Facilities of
Station WSJL(FM), Cape May,
New Jersey

ORDER TO SHOW CAUSE

Adopted: October 14, 1988; Released: October 18, 1988

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau acting pursuant to authority delegated under 47 C.F.R. §§ 0.61 and 0.283, has before it: (i) the above-captioned application of Paul and Nancy Schumacher (The Schumachers) for a construction permit to modify the facilities of station WSJL(FM), Cape May, New Jersey, by increasing antenna height, which was granted on January 27, 1988; and (ii) the determination of the Federal Aviation Administration (FAA) that the proposed antenna tower would create a hazard to air navigation, issued on June 2, 1988.

2. *Background.* On June 2, 1985, the Schumachers notified the FAA of a proposed alteration in the technical facilities of WSJL(FM). The FAA's aeronautical study no. 85-AEA-0675-OE indicated that the proposed tower would not be a hazard to air navigation if it were reduced to a height of 244 feet above ground level (AGL), 254 feet above mean sea level (AMSL); the determination was issued on May 2, 1986 and was valid for six months. On April 22, 1987, the FAA granted a six-month extension of time for the May 2 grant. However, the extension erroneously specified the originally proposed height of 310 feet AMSL rather than the negotiated height of 254 feet AMSL. On May 19, 1987, the Schumachers filed the instant modification, requesting *inter alia*, an increase in tower height to 310 feet AMSL. The application was granted on January 27, 1988, and the Commission understands that the proposed antenna tower has since been erected. However, on June 2, 1988, the FAA issued a "Determination of Hazard to Air Navigation," indicating that the error in the extension did not change the conditions of the original determination. The purpose of this document is to solicit information on whether or not WSJL(FM)'s recent permit should be modified to eliminate the air hazard by, as indicated in both the May 1986 and June 1988 FAA determinations, reducing the height of the antenna tower from 300 feet AGL, 310 feet AMSL, to 244 feet AGL and 254 feet AMSL.

3. Under Section 316(a) of the Communications Act of 1934, as amended (47 U.S.C. § 316(a)), the Commission may modify any station's license or permit if: (i) such action will promote the public interest, or further compliance with the Communications Act or any treaties ratified by the United States; and (ii) the holder of the license or permit has been notified in writing of the proposed action and the grounds therefore and given "reasonable opportunity" to respond and request a hearing. A "reasonable opportunity" is deemed to be at least thirty (30) days "except that, where safety of life or property is involved, the Commission may by order provide for a shorter period of notice." Under Section 1.87(e) of the Commission's Rules, 47 C.F.R. § 1.87(e), where the right to hearing has been waived[1] and no written statement has been filed within the time specified in the order to show cause, the licensee or permittee will be deemed to consent to the modification as proposed in the order to show cause and a final decision will be issued by the Commission accordingly.

4. We believe that the public interest clearly requires the issuance of an order to show cause here, in order to alleviate the hazard to air navigation caused by WSJL(FM)'s tower. Additionally, because of the nature of the danger involved, we believe that safety of life is involved, and we shall specify a notice period of 15 days from the release of this Order. Accordingly, IT IS ORDERED, that pursuant to 47 U.S.C. § 316(a) and 47 C.F.R. § 0.61 Paul and Nancy Schumacher licensee and permittee of station WSJL(FM), Cape May, New Jersey, SHALL SHOW CAUSE why its permit (file no. BPH-870519IC) should not be modified to specify operation with a maximum tower height of 244 feet AGL and 254 feet AMSL at its present location[2] if the Commission determines that the public interest would be served by adopting such limits.

5. IT IS FURTHER ORDERED, that pursuant to 47 C.F.R. § 1.87, Paul and Nancy Schumacher may, not later than **November 3, 1988,** request that a hearing be held on the proposed modification. If the right to a hearing is waived, the Schumachers may, not later than **November 3, 1988** submit a written statement showing with particularity why its permit should not be modified as proposed in the Order to Show Cause. In this case, the Commission may call upon the Schumachers to provide additional information, designate the matter for hearing, or issue, without further proceeding, an Order modifying the license of WSJL(FM) as proposed in this Order to Show Cause. If the right to hearing is waived and no written statement is filed, the Schumachers will be deemed to consent to the modification as proposed and a final Order will be issued by the Commission if the change is found to be in the public interest. Copies of this document shall be mailed to each party.

6. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY TO THIS PROCEEDING.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker, Chief
Mass Media Bureau

FOOTNOTES

[1] The right to hearing will be deemed waived if the licensee fails: (i) to file a timely written statement that it requests and will attend such hearing; or (ii) to appear at the scheduled hearing.

[2] The coordinates of the antenna tower are 39° 00' 13" North Latitude, and 74° 52' 13" West Longitude.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

FISHER BROADCASTING INC., — 8330-DS C8-477

Licensee of Television Station KATU, Portland, Oregon

For Declaratory Ruling

STAFF RULING

Adopted: October 18, 1988; Released: October 18, 1988

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a request for declaratory ruling filed by Fisher Broadcasting Inc., licensee of KATU, Portland, Oregon, seeking a Commission declaration that "AM Northwest," "Sunday Northwest," and "Town Hall" are exempt from equal opportunities as "bona fide news interview" programs under Section 315(a)(2) of the Communications Act of 1934, as amended. We have determined that all three programs satisfy the criteria established for exempt bona fide news interview programs. Accordingly, we conclude that the programs are exempt.

2. KATU states that it "produces and is directly responsible for the production and control of the programs." More specifically, according to KATU, "AM Northwest" is a talk and information program with an emphasis on local news and information broadcast before a studio audience. "AM Northwest" has been broadcast weekdays, 9:00-10:00 a.m., for twelve years. With respect to the studio audience and a call-in segment of the program, KATU states that it screens the calls and controls the audience's participation to maintain focus upon the topic and prevent speechmaking. Recent topics have included AIDS, education, homelessness, street crime, and transportation. According to KATU, "Sunday Northwest" is the weekend version of "AM Northwest" and has been regularly broadcast for over one year.

3. KATU states that "Town Hall" is broadcast before an audience in a town hall like setting with an "emphasis on timely, controversial issues confronting the Portland community and the broadcast of conflicting points of view from all assembled." Town Hall has been broadcast 6:00-7:00 p.m. on Sunday evenings for twelve years. In its attention to controversial issues of importance to the community, Town Hall frequently deals with legislative activity. As such, it includes elected officials and candidates who discuss various pertinent legislative activities. KATU notes that "similar to the 'Donahue' show, Town Hall introduces a topic and permits interaction among audience, invited guests and the host. At no time are participants allowed to monopolize the broadcast or afforded an opportunity to speak in an unrestrained manner."

4. In sum, KATU contends that its programs, "AM Northwest," "Sunday Northwest," and "Town Hall" meet the criteria for a news interview exemption under Section 315(a)(2) in that: (1) they are regularly scheduled; (2) KATU directly produces and controls each; and (3) KATU's decisions on the format, content, and participants are based on its reasonable good faith journalistic judgment, rather than an intention to advance any individual's candidacy. Consequently, KATU maintains that candidate appearances on these programs should not be subject to equal opportunities.

DISCUSSION

5. Section 315 of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to "use" broadcasting station (an appearance by picture or voice), it must afford equal opportunities to other such candidates for that office. In 1959, Congress amended Section 315 to exempt four categories of news programming from the equal opportunities requirements:

> (1) bona fide newscast;
>
> (2) bona fide news interview;
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a). In determining whether a program falls within the "bona fide news interview" exemption, the Commission considers whether it is regularly scheduled, whether the broadcaster controls the program, and whether the broadcaster's decisions on the format, content and participants are based on its reasonable, good faith journalistic judgment and newsworthiness rather than on an intention to advance any individual's candidacy. *See U. S. News and World Report, L. P.*, 2 FCC Rcd 7101 (1987).

6. Based on the information before the Commission and our precedent it appears that "AM Northwest," "Sunday Northwest," and "Town Hall" are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2). Each program is regularly scheduled. The licensee asserts that it produces and controls all three programs and that all decisions as to topics, guests, format, and content are made by KATU personnel based on good faith journalistic judgment and the intention "to provide news and information on community problems and issues to KATU's local audience, not to advance or oppose any political candidate." The licensee has indicated that it utilizes sufficient control over the audience for each program consistent with previous Commission reasoning. *See Multimedia Entertainment, Inc.*, (Donahue) 56 RR 2d 143 (1984).

7. In view of the foregoing, it appears that "AM Northwest," "Sunday Northwest," and "Town Hall" may be classified as bona fide news interviews. Accordingly, appearances by legally qualified candidates on these programs will be exempt from the equal opportunities requirement of Section 315.

8. Staff action is taken here pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-41

In the Matter of

Amendment of Section 73.202(b), RM-6144
Table of Allotments,
FM Broadcast Stations.
(McArthur, Ohio)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: October 26, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Hometown Broadcasting of McArthur, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 890 (1988), proposing the allotment of Channel 254A to McArthur, Ohio, as the community's first local FM allotment. Petitioner filed coments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by alloting Channel 254A to McArthur, Ohio, since it could provide the community with its first local FM service. Channel 254A can be allotted to the community in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence has been received since McArthur is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
McArthur, Ohio	254A

4. The window period for filing applications will open on **December 13, 1988,** and close on **January 12, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 39-14-42 and West Longitude 82-28-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-129

In the Matter of

Amendment of Section 73.202(b), RM-6199
Table of Allotments,
FM Broadcast Stations.
(Bridgeport, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: October 26, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Programmed Communications, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 1946 (1988), proposing the allotment of Channel 258A to Bridgeport, New York, as the community's first local FM service. Comments in support of the allotment were filed by the petitioner and by Agape Victory Christian Center (Agape), with each party stating an intention to apply for the channel, if allotted.

2. We believe the public interest would be served by allotting Channel 258A to Bridgeport, New York, since it could provide the community with its first local FM service. Channel 258A can be allotted to Bridgeport in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.0 kilometers (1.9 miles) east to avoid a short-spacing to Station WOKW, Channel 260B, Cortland, New York.[1] Canadian concurrence has been received since Bridgeport is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Bridgeport, New York	258A

4. The window period for filing applications will open on **December 13, 1988,** and close on **January 12, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 43-09-22 and West Longitude 75-55-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-43

In the Matter of

Amendment of Section 73.202(b), RM-6119
Table of Allotments,
FM Broadcast Stations.
(La Grande, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: October 26, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Grande Radio, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 886 (1988), proposing the substitution of Channel 254C2 for Channel 252A at La Grande, Oregon, and the modification of its license for Station KKUC(FM) to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. Channel 254C2 can be allotted to LaGrande in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction as well as at the site 12.5 kilometers (7.8 miles) north of the community specified by the petitioner.[1] As proposed, we shall also modify petitioner's license for Station KKUC(FM) to specify operation on the higher powered channel.

3. We believe the public interest would be served by substituting Channel 254C2 for Channel 252A at LaGrande, Oregon, since it could provide the community and its environs with expanded radio service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
La Grande, Oregon	254C2, 261A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Grande Radio, Inc. for Station KKUC(FM), La Grande, Oregon, IS MODIFIED effective **December 12, 1988,** to specify operation on Channel 254C2 in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 45-26-15 and West Longitude 118-05-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-154

In the Matter of

Amendment of Section 73.202(b), RM-6200
Table of Allotments,
FM Broadcast Stations.
(Grifton, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: October 26, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of MC Radio Partnership (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 2231 (1988), proposing the substitution of Channel 258C2 for Channel 257A at Grifton, North Carolina, and the modification of its construction permit for Station WVVY to specify the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 258C2 to Grifton, since it could enable Station WVVY to expand its service area. Channel 258C2 can be allotted to Grifton in compliance with the Commission's minimum distance separation requirements with a site restriction of 27.7 kilometers (17.2 miles) southeast to avoid a short-spacing to Station WMAG, Channel 258C, High Point, North Carolina, and to unused but applied for Channel 258A at Emporia, Virginia.[1] As proposed, we shall also modify the construction permit of Station WVVY to specify operation on Channel 258C2.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Grifton, North Carolina	258C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of MC Radio Partnership for Station WVVY, Grifton, North Carolina, IS MODIFIED, effective **December 12, 1988,** to specify operation on Channel 258C2 in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 35-13-05 and West Longitude 77-12-01. The *Notice* proposed a site restriction of 26.0 kilometers (16.2 miles) southeast. However, we have made a minor change in the site restriction in order to accommodate the applications which have been filed for Channel 258A at Emporia.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-173

In re Applications of

JAM COMMUNICATIONS, INC. File No. BPCT-870121KF

DELTA TELEVISION LIMITED File No. BPCT-870121KG

For Construction Permit
for a New Television Station
Jackson, Mississippi

Appearances

Thomas L. Root, Esquire, Jill Rygwalski, Esquire, and *Shelley Sadowsky, Esquire,* on behalf of Robert G. Nichols, Jr.; *Seymour M. Chase, Esquire,* and *John J. Schauble, Esquire,* on behalf of JAM Communications, Inc.; *Donald J. Evans, Esquire,* and *Pamela C. Cooper, Esquire,* on behalf of Delta Television Limited; and *Brian Kilbane, Esquire,* and *Linda R. Bocchi, Esquire,* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: October 18, 1988; Released: October 26, 1988

PRELIMINARY STATEMENT

1. This proceeding was designated for hearing by *Hearing Designation Order,* DA 87-626, released June 15, 1987. Originally, there were five applicants involved in this proceeding, but the applications of Fredrick Grimm, d/b/a Mountlake Productions, Ltd., and Mississippi College were dismissed by the Presiding Judge prior to hearing.[1] The remaining applicants were Robert G. Nichols, Jr. (Nichols), JAM Communications, Inc. (JAM), and Delta Television Limited (Delta). The Order of designation specified the following issues regarding the remaining applicants:

> To determine, with respect to Robert Nichols and JAM Communications, Inc. whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
>
> To determine which of the proposals would, on a comparative basis, best serve the public interests. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. The air hazard issue regarding JAM was resolved in favor of the applicant by *Memorandum Opinion and Order* released August 28, 1987 (FCC 87M-2030).

3. A prehearing conference in this proceeding was held on August 26, 1987. Hearing sessions were held on January 19, 1988, January 20, 1988, and April 12, 1988. The record was closed on April 12, 1988.

4. JAM and Delta filed proposed findings of fact and conclusions of law on June 6, 1988. Reply findings were filed by these two applicants on June 17, 1988. Although Nichols participated in the hearing, neither findings nor reply findings were filed by that applicant. As a result, the Presiding Judge granted a motion to dismiss filed by JAM and dismissed the Nichols application by *Memorandum Opinion and Order* released July 21, 1988 (FCC 88M-2333).[2]

FINDINGS OF FACT

***JAM Communications, Inc.* (JAM)**

Structure and Formation

5. JAM Communications, Inc. (JAM), is a corporation organized under the laws of the state of Delaware. At the time JAM's application was originally filed, the applicant was JAM Communications, Inc., a corporation organized under the laws of the state of Mississippi. In June of 1987, the Delaware corporation was formed, and the Mississippi corporation was merged into the Delaware corporation. The stockholders, directors, and officers of the Delaware corporation are the same as the stockholders, directors and officers of the Mississippi corporation (JAM Ex. 1).

6. The three principals of JAM are Hilda C. Jones, John A. Peoples, and Mavis L. P. James. Each principal holds one-third of JAM's voting stock and is one of JAM's three directors. Mrs. Jones is JAM's president, Dr. Peoples is its vice president, and Mrs. James is its secretary and treasurer.

7. The three principals of JAM became acquainted with one another and involved in this application for a new television station for Jackson, Mississippi, as a result of phone calls from a local Jackson attorney named Alveno Castilla (Tr. 138, 187, 213). Initially, Mr. Castilla was known to only Dr. Peoples and Mrs. James (Tr. 186, 213-214). Dr. Peoples knew Mr. Castilla while Dr. Peoples served as president of Jackson State University. During that time, Mr. Castilla was an accountant at the university (Tr. 186). Mr. Castilla was not Dr. Peoples' lawyer (Tr. 187). Mr. Castilla phoned Dr. Peoples "about the second week in January" of 1987 to inform him of the television station opportunity (*Id.*). Prior to this call, Dr. Peoples had never expressed an interest in becoming involved in a television application (*Id.*). A few days after this phone conversation, Dr. Peoples met with Mr. Castilla (Tr. 188). At the close of this meeting, Dr. Peoples decided he was interested in pursuing the project (Tr. 190). Mrs. James had also been contacted by Mr. Castilla concerning the television project (Tr. 213). Mrs. James was acquainted with Mr. Castilla from a prior cellular communications venture (Tr. 214).

8. Mrs. Jones was contacted by Mr. Castilla by phone (Tr. 138). Prior to this phone call, Mrs. Jones did not know Mr. Castilla (*Id.*). Mrs. Jones attended a meeting at Mr. Castilla's office around the middle of January 1987

with Dr. Peoples, Mr. Castilla and Mr. Ludlum (a partner in Mr. Castilla's firm) concerning the television project (Tr. 141, 143). At the close of this meeting, Mrs. Jones did not indicate whether she would become involved (Tr. 143-144). Sometime later she decided to do so and communicated this to Mr. Castilla (Tr. 145).

9. The next meeting was held with Dr. Peoples, Mrs. Jones and Mrs. James at the offices of Mr. Castilla's firm (Tr. 145). Mr. Castilla was present at this meeting (*Id.*). Mr. Castilla advised the group on the proposed corporate structure of the applicant and the use of voting and non-voting stock (Tr. 146-147).

Integration

Hilda C. Jones

10. Hilda C. Jones proposes to work full time (not less than 40 hours per week) at the proposed station (JAM Ex. 2, p. 1). Mrs. Jones will serve as the station's program director (*Id.*). She will manage and direct the evaluation, acquisition and scheduling of programs to be broadcast (*Id.*). Jones has worked occasionally at MINACT, Inc., a job and management training firm owned by her husband (Tr. 153-154). If the JAM application is granted, she will terminate this work.

11. Jones has lived in Jackson for the past ten years. She is a black female (JAM Ex. 2, p. 1). From 1984 to the present, Jones has been a member of the Jackson Public School District Board of Trustees. This board, which is appointed by the Mayor of Jackson and which serves without pay, supervises the operation of the Jackson city schools. In June of 1987, Jones was appointed to the local school board's Advisory Committee. This body meets two or three times a year with the Mississippi State Board of Education and acts as a liaison between local school boards and the state board (JAM Ex. 2, 1).

12. From 1982 to the present, Jones has been a member of the Arts Alliance of Jackson and Hinds County. This organization is the designated arts agency for the City of Jackson and Hinds County to promote and coordinate local arts activities. It has received grants from the National Endowments for the Arts and sponsors independent grants to local artists. Jones has been a member of the organization's Education Committee and Membership Committee. She was instrumental in persuading the Jackson public schools to create the position of Arts Education Coordinator (JAM Ex. 2, pp. 1-2).

13. Jones has been a member of the Jackson Chapter of Jack and Jill of America, Inc., since 1980. This is a national organization designed to strengthen black families. The Jackson Chapter actively participates in community service projects such as assisting the United Negro College Fund. Since 1984, she has been the chapter's Teen Program Chairperson, and she has arranged for teenagers to attend the organization's regional conferences, where they can participate in various contests and service projects. In 1987, Jones was the vice president of the Jackson Chapter of Alpha Kappa Alpha Sorority (Tr. 135). For the two prior years, Jones was the chapter's financial secretary, and she has also served as secretary for four years. The sorority awards scholarships to students in the Jackson area. It also runs an " Adopt-a- Family" program designed to aid low-income families.

14. From 1986 to the present, Jones has been a member of the United Way Allocations Committee for the Jackson area. This committee reviews requests for funds by United Way member agencies and determines the sum of money that each agency will receive. Since June of 1987, Jones has been a member of the Mississippi Workmen's Compensation Advisory Council. This organization, which reports to the state Workmen's Compensation Commission, was established to discuss and to propose changes in the state's workmen's compensation law.

15. Jones is currently an advisor to the president of the Mississippi State Congress of Parents and Teachers. Since 1980, she has been a member of the board of directors of the Jackson Council of the PTA. She was the president from 1982 to 1984. From 1983 to April 1987, Jones was a member of the board of directors of the Middle Mississippi Girl Scout Council. From 1978 to 1982, she was a Girl Scout leader in Jackson.

16. In 1982 and 1983, Jones was a member of the Performance-Based Accreditation Task Force for the state of Mississippi. This task force was appointed by the Governor of Mississippi and developed performance-based standards for Mississippi school systems.

17. Jones has been called a "professional volunteer" and currently spends two to two and a half days a week on volunteer activities (Tr. 155). If the JAM application is granted, Jones will continue her civic involvement but only to an extent that is consistent with her full-time position at JAM's station (JAM Ex. 2, p. 3).

John A. Peoples

18. John A. Peoples proposes to work full time (not less than 40 hours per week) at the station (JAM Ex. 3, p. 1). He will serve as the station's general manager (*Id.*). In that capacity, Dr. Peoples will manage and direct all the operations of the station. He will accomplish this, at least in part, through department heads (*Id.*). Peoples has lived in Jackson for the past twenty-three years. He is a black male. [3]

19. Peoples is currently retired. He was the president of Jackson State University in Jackson for 17 years (Tr. 180-181). For the past 17 or 18 years, Peoples has been a member of the board of directors of the Piney Woods Country Life School in Piney Woods, Mississippi. Piney Woods is approximately 22 miles south of Jackson and is within the city-grade contour of JAM's proposed station. This is a boarding school which provides elementary and secondary education to minority youngsters in a rural setting.

20. From 1975 to the present, Peoples has been a member of the Southern Regional Education Board. This board consists of representatives of each of the southern states and is chaired by the Governors of the member states on a rotating basis. The board develops public policy on education for state governments. Peoples has been appointed to the board by four different Governors of Mississippi. From 1980 to 1982, he was the board's vice chairman. From 1975 to the present, Peoples has been a member of the board of directors of Mississippi Ballet International, Inc. This organization raises funds for, and organizes and operates a major international ballet competition in, Jackson every four years. The next competition is scheduled for 1989.

21. Since 1977, Peoples has been a member of the Community Coordinating Committee. This group of Jackson citizens holds conferences to inform citizens, especially minorities, on important issues in Mississippi. The organization works to promote citizen involvement in democracy. Peoples is currently involved as a member of the organization's Steering Committee. Also since 1977, Peoples has been a member of the Mayor's Prayer Breakfast Steering Committee. This group plans the program for the annual Mayor's Prayer Breakfast, which usually includes scripture readings, Bible study courses, and a notable speaker on religion.

22. Peoples has been a member of the board of directors of the Jackson, Mississippi, Association for the Preservation of Smith Robertson School since the association's inception eight years ago. The Smith Robertson School was the first public school for blacks in Jackson. Peoples is currently serving his third year as Chairman of the Board. Since 1977, Peoples has been a member of the board of directors of Goodwill Industries for Jackson. He has also served on that organization's Executive Committee.

23. Since 1984, Peoples has been a member of the board of directors of the Jackson-Hinds Comprehensive Health Center in Jackson. This is a federally funded comprehensive health clinic which provides health care to low- income persons in the Jackson area. From 1970 to 1974, Peoples belonged to a predecessor organization that attempted to form such a clinic.

24. For the past two years, Peoples has been a member of the Advisory Council of the Mayor's International Trade Commission. This group provides the Mayor of Jackson with ideas on how to attract new foreign businesses to Jackson.

25. Beginning in October of 1987, Peoples became a member of the executive board of the Andrew Jackson Council of the Boy Scouts of America. This organization supervises ten Boy Scout districts in Mississippi, including Jackson and environs. Peoples also served in this capacity from 1974 to 1982. In November 1985, Peoples presided at a panel discussion on education at the Fortieth Annual Mississippi State Conference of the NAACP in Jackson. For the past three years, he has been a life member of the NAACP (Tr. 183).

26. Peoples was also previously a member of the board of directors of several other community organizations in Jackson. From 1971 to 1984, he was on the board of Opera South, an organization that sponsored and supported performances of black opera at three universities, including Jackson State University. From 1975 to 1984, he was a director of Harbor House of Jackson, Inc., an organization that worked to rehabilitate alcoholics. For 11 years (1972 to 1983), he was on the board of directors of the Jackson Symphony Orchestra. He was also on the board of the Jackson Urban League from 1980 to 1984, of the Jackson Chapter of the United Way from 1969 to 1981, and of the Jackson Chamber of Commerce from 1974 to 1980. Lastly, in January of 1988, Peoples became a director of the Jackson Zoological Park (Tr. 182-183).

27. If the JAM application is granted, Peoples will remain active in community organizations, but only to an extent consistent with his full-time employment at JAM's station.

Mavis L. P. James

28. Mavis L. P. James proposes to work full-time (not less than 40 hours per week) at the station. She will serve as the station's business manager (JAM Ex. 4, p. 1). In addition, Mrs. James will assume the role of general manager in the absence or disability of the general manager and will manage and direct the station's budgeting, accounting, billings and receipts, collections and disbursements, personnel administration, leasing of land and equipment, purchasing of equipment and supplies, contracting for needed services and related activities (*Id.*).

29. Mrs. James works presently as a licensed real estate broker. She is an independent contractor associated with Urban Realty in Jackson (*Id.*). She presently works forty to fifty hours per week, but if JAM's application is granted, James will discontinue her work as a broker and end her association with Urban Realty. James has lived in Jackson for the past seven years. She is a black female (JAM Ex. 4).

30. Since 1984, James has been a member of the board of directors of the Family Service Association of Jackson (now the Mississippi Children's Home Society and Family Service Association). This organization provides various types of services for families. This includes adoption services, a home for single mothers, and job counseling for unemployed mothers. James is currently a member of the board's Finance Committee and was previously the organization's treasurer. From 1985 to the present, James has been a member of the Jackson Chapter of Jack and Jill of America, Inc. As previously noted, this is a national organization which is designed to strengthen black families. The Jackson Chapter actively participates in community service projects such as helping the United Negro College Fund. James is currently the chairperson of the Audit Committee.

31. Since June 1987, James has been a member of the board of directors of the Repertory Theatre of Mississippi. This group helps artists in the Jackson area raise funds and find places to perform. It also makes small grants to artists. James is also a member of the Membership Committee. James was the financial secretary of the Jackson Chapter of Alpha Kappa Alpha Sorority from 1985 to 1987 (Tr. 211). She has also been a long-standing member of the sorority, which awards scholarships to students in the Jackson area and runs an "Adopt-a-Family" program designed to aid low-income families. James is also currently the chairperson of the Volunteer Committee of the Mississippi Chapter of the United Negro College Fund Telethon. In that role, she supervises the volunteers who work on the telephone during the organization's fundraising activities. For the past year, James has been a member of the Jackson Chamber of Commerce.

32. If the JAM application is granted, James will continue her involvement in community activities but only to an extent consistent with her full-time employment at JAM's station.

Diversification

33. Neither JAM Communications, Inc., nor any of its principals has held any ownership interest in any broadcast station, any broadcast-related enterprise, or any other medium of mass communications since its application was filed on January 21, 1987 (JAM Ex. 5).

Delta Television Limited (Delta)

Structure and Formation

34. Delta is a limited partnership formed under the laws of Mississippi. Its general partner is Delta Television, Inc., a Delaware corporation. Delta Television, Inc., holds a 20 percent interest in the partnership. The sole stockholder, director and officer of the corporation is Lesia K. Lammons. Raymond L. McGuire is the sole limited partner, and he owns the remaining 80 percent partnership interest (Delta Ex. 1).

35. In late November or early December of 1987, Douglas McFadden of the law firm McFadden, Evans & Sill, Delta's counsel in this proceeding, called McGuire and told him of an opportunity to apply for a television channel at Jackson, Mississippi (Tr. 248-249). McFadden and McGuire have been friends for more than 15 years, beginning when they worked together for AT&T (Tr. 247). McFadden suggested that McGuire apply for the channel (Tr. 250). McGuire made the decision to apply for the channel approximately seven to ten days before the application was filed (Tr. 251). He authorized the McFadden, Evans & Sill firm to take whatever steps were needed to prepare and to file an application (Tr. 252-253).

36. Between the date on which McGuire authorized McFadden, Evans & Sill to prepare the application and the "A" cut-off date or deadline for filing the Delta application (January 21, 1987), a consulting engineer was hired and engineering materials were prepared for the application. The idea was also developed to mount an antenna on an existing tower and reasonable assurance of the availability of space on the tower was also obtained in that period. Estimates of the costs of constructing a television station at Jackson and operating it for three months without revenue were developed. All these steps were undertaken before Lammons became involved in the Delta application, and she does not know who undertook them (Tr. 324-334).

37. McFadden, Evans & Sill prepared a draft of a limited partnership agreement prior to January 21, 1987. McGuire saw a copy of the draft before that date (Tr. 283).

38. On or immediately prior to January 20, 1987 (the parties were unable to specify the date, but the record indicates that it was on January 18, 19 or 20), McGuire called Lammons and asked whether she would be willing to become a partner in an application for the Jackson channel (Tr. 310, 359). Lammons and McGuire did not know each other before that telephone call (Tr. 278, 309). McGuire learned of Lammons through Dan Dubose, a friend who McGuire had asked to become part of an application (Tr. 286-287). In the initial conversation with McGuire, Lammons agreed to become a partner in a partnership which would be the applicant (Tr. 359).

39. After McGuire's first telephone conversation with Lammons, she did nothing because she was waiting to be told that McGuire had definitely decided to go forward with the application (Tr. 360-361). The next communication Lammons had concerning the application was a telephone call on January 21, 1987, from Donald Evans of McFadden, Evans & Sill (Tr. 312, 360). Evans informed her that McGuire had decided to go forward with the application (Tr. 360-361). Evans then told Lammons that the applicant would be a limited partnership (Tr. 313). A corporate general partner was developed for the express purpose of enabling Lammons to avoid any responsibility for any partnership debts or expenses (Tr. 314).

40. During the same conversation of January 21, 1987, Lammons adopted Evans' suggestion that another attorney in his office (Pamela Colabella, now Mrs. Pamela Cooper) be appointed secretary of Delta Television, Inc., so that she could sign the application (Tr. 337-338). Evans and Colabella asked Lammons the questions that were contained in the application form, and Lammons provided answers with regard to herself (Tr. 354). The law firm had earlier posed the same questions to McGuire, and Lammons was not told what answers McGuire had provided (Tr. 269-270, 355). Colabella signed the application as secretary of Delta Television, Inc. (Tr. 338). Lammons did not see the application until after it was filed with the Commission (Tr. 364; JAM Ex. 20). On February 13, 1987, Colabella sent Lammons her resignation as secretary of Delta Television, Inc., "effective February 1, 1987." (JAM Ex. 19.)

41. Delta's Limited Partnership Agreement was not signed by Lammons (JAM Ex. 11). Instead, Colabella signed the agreement on January 21, 1987, as the secretary of Delta Television, Inc. (JAM Ex. 11, p. 7). Lammons assumed that the partnership agreement was drafted on January 21, 1987, but McGuire had seen a draft of the partnership agreement before that date (Tr. 283, 345). According to Lammons, the agreement was read to her (Tr. 346). She did not remember suggesting any changes in the agreement (Tr. 349). Lammons first received a copy of the Limited Partnership Agreement under a letter from Colabella dated February 2, 1987 (JAM Ex. 16). When she received the copy of the agreement, it was already signed by Colabella and McGuire (Tr. 349).

42. Delta's Limited Partnership Agreement requires the general partner to use its best efforts to obtain financing (JAM Ex. 11, p. 3). Under the date January 21, 1987, an officer of the American Fletcher National Bank in Indianapolis, Indiana, wrote a letter upon which Delta is relying to establish its financial qualifications (Tr. 352; JAM Ex. 17). The letter is addressed to Lammons' home address, but the salutation in the letter is "Dear Sir" (Tr. 350). Lammons has no recollection of seeing the letter before her deposition in November 1987 (Tr. 351). Lammons claimed that she was responsible for Delta's certification that it was financially qualified, but McGuire testified at his deposition that he was responsible for providing the information (about his personal finances) which served as the basis for that certification (Tr. 274-276). As previously noted, Lammons was told nothing of whatever information McGuire provided to the firm for the purposes of the application (Tr. 354-355). Lammons believes that the partnership will seek loans, at some point in the future, from a source not yet identified (Tr. 316, 400).

43. The general partner's certificate of incorporation was prepared at the direction of McFadden, Evans & Sill (Tr. 339). Lammons did not see the document before Delta's application was filed (*Id.*). She also did not see, before January 21, 1987, a set of documents consisting of another copy of the certificate of incorporation, a recording receipt, and a statement of sole incorporator (Tr. 341; JAM Ex. 14).

44. The organizational meeting of the board of directors of Delta Television, Inc., was held during the telephone call between Lammons and the McFadden, Evans & Sill

firm on January 21, 1987 (Tr. 401-402; JAM Ex. 21). The minutes were signed by Colabella, and they contain the representation that they were "adopted" on January 31, 1987 (JAM Ex. 21, p. 2).

45. A second meeting of the board of directors of Delta Television, Inc., was held (JAM Ex. 23). Lammons initially testified that a total of two directors' meetings had been held and that the second meeting was held the day before her testimony at the hearing (Tr. 369). After she was shown JAM Ex. 23, she said that there had been three meetings (Tr. 371). Lammons signed the minutes of the second meeting, but she could not remember when the meeting was held or when she signed the minutes (Tr. 372). The minutes were first sent to her on August 21, 1987 (JAM Ex. 22).

46. In her direct testimony, Lammons stated that the relative equity interests of the two partners was decided upon after negotiations between her and McGuire (Delta Ex. 1, p. 1). In fact, the 80/20 equity division was McGuire's proposal, and there was no negotiation on this point (Tr. 280, 398- 399). There is nothing in the record to indicate that any other element of their arrangement was negotiated.

47. Lammons has contributed100 to Delta (Tr. 314). She has no obligation to provide any additional funds to Delta out of her personal resources (Tr. 315). Under Delta's Limited Partnership Agreement, McGuire is obligated to provide up to25,000 for pre-grant expenses and up to50,000 for post-grant expenses (JAM Ex. 11, p. 4). However, McGuire has already paid more than25,000 in pre-grant expenses and intends to pay more than the50,000 in post-grant expenses if necessary to build and operate the station, and it makes economic sense to do so (Tr. 264-265). The general partner, under the terms of the partnership agreement, has the sole and exclusive responsibility for conducting the business of the partnership (Delta Ex. 1, p. 1). According to the agreement, the limited partner is precluded from taking part in the management or control of the partnership business. Under the partnership agreement, Lammons is barred from dismissing the Delta application, in a settlement or otherwise, unless McGuire has been paid all expenses he has incurred under the partnership (JAM Ex. 11, p. 3).

48. Paragraph 14 of Delta's Limited Partnership Agreement requires that all profits from the operation of the station be paid to McGuire until he has received a sum equal to all his capital contributions except for what amounts to400 (JAM Ex. 11, p. 5).[4] The general partner is required to distribute at least 85 percent of the profits within 60 days of the end of each fiscal year (*Id.*).

49. Lammons did not know on what basis the McFadden, Evans & Sill firm charges for its services to Delta (Tr. 323-324). She did not know whether there is a written retainer agreement between Delta and the law firm (Tr. 320). She also did not know that McGuire retained the law firm (*Id.*). *Delta's consulting engineer is Mullaney Engineering, Inc. (Tr. 320-321). Lammons' only dealings with the engineering firm have been to pay its bills (Tr. 324). She did not know who retained the Mullaney firm or on what basis the firm charges for its services (Tr. 324).*

Integration

50. Lesia Lammons will work full time (not less than 40 hours per week) as the station's general manager (Delta Ex. 2, p. 3). As general manager, Ms. Lammons will oversee all aspects of the station's operations including sales, programming, personnel, engineering and administration (*Id.*, 3). She will be responsible for all of the hiring and firing of personnel for the station (*Id.*). In addition, all department heads will report directly to Ms. Lammons, and she will be responsible for monitoring the station's compliance with all FCC regulations and requirements (*Id.*).

51. Ms. Lammons is currently employed as a vice-president of General Pump and Equipment Company, a company owned by her parents (Tr. 305; Delta Ex. 2, p. 1). She has been an electrical engineer for 12 years (*Id.*). Ms. Lammons specializes in water and waste water management and treatment (Delta Ex. 2, p. 1). Ms. Lammons will relinquish her position at General Pump and Equipment Company to satisfy her integration proposal (*Id.*, p. 3).

52. Ms. Lammons has participated in community and civic activities in and around Jackson. She is past secretary and treasurer of the Jackson Chapter of the Mississippi Engineering Society (Delta Ex. 2, p. 2). Ms. Lammons was, until the time of her recent surgery, the president-elect of the Mississippi Engineering Society (Tr. 300; *Id.*). The chapter works with high school and junior high school teenagers to promote excellence and achievement in school and continuing education beyond high school (Delta Ex. 2, p. 2). The society also seeks to promote professionalism in the state of Mississippi. Ms. Lammons has also served as the president-elect and president of the Professional Engineers in Industry Society (Delta Ex. 2, p. 2). This organization is currently attempting to secure needed equipment for the engineering lab of the local university (*Id.*). Further, the society promotes the dispersion of information on industry in Mississippi, encourages the development of industry in Mississippi, and helps to promote the jobs in Mississippi (Tr. 298-299; *Id.*).

53. Ms. Lammons is also a current member of a number of technical organizations including: the Mississippi Chapter of the American Water Works Association and the Mississippi Water Pollution Control Federation (Delta Ex. 2, p. 2). The American Water Works Association promotes standards and helps in the training of operators for the state of Mississippi on the proper treatment of water (Tr. 302). The Mississippi Water Pollution Control Federation performs a similar function and tries to disseminate information and ideas to the state and county about federally funded projects and special money available for waste water treatment, a serious problem in Mississippi (*Id.*).

54. Ms. Lammons is female and was born in Jackson (Delta Ex. 2, 1). She lived within the service area from birth until the age of 23 and for the last four years, and she currently resides there (*Id.*).

Diversification

55. Neither Delta Television Limited nor its general or limited partners has any ownership interest in any medium of mass communications (Delta Ex. 3, p. 1).

Comparative Coverage

56. The areas and populations that the applicants propose to serve are as follows:

Applicant	Area (sq. km.)	Population
Delta	24,821	624,090
JAM	23,981	615,795

(Joint Ex. 1.)

57. The following data regarding the number of other services available in terms of area and population within the predicted Grade B contour are listed as follows:

OTHER SERVICES[5]	JAM POP.	JAM AREA	DELTA POP.	DELTA AREA
3	10,311	927.2	10,316	1,003.5
4	44,144	2,532.0	45,947	2,725.9
5	88,835	6,880.9	93,330	7,258.7
6	162,934	9,715.8	164,926	9,903.3
7	309,571	3,925.4	309,571	3,929.7

(Joint Ex. 1, p. 3.)

ULTIMATE FINDINGS AND CONCLUSIONS

58. This proceeding presently involves the mutually exclusive applications of JAM Communications, Inc. (JAM) and Delta Television Limited (Delta). These applications must be evaluated under the comparative issue. Such evaluations are governed by the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (hereinafter *Policy Statement)*. In its *Policy Statement*, the Commission established the two primary objectives toward which the process of comparison should be directed: (1) the best practicable service to the public; and (2) a maximum diffusion of control of the media of mass communications. Because neither applicant nor its principals have any attributable media interest cognizable under the comparative issue, the applicants are equal in this important comparative criteria and neither receives a preference.

59. In determining which applicant will insure the best practicable service to the public, the Commission, in its *Policy Statement*, stated that consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners -- including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated." *Policy Statement*, *supra*, at 395. Full-time, or almost full-time participation in station operation by owners is of primary interest, particularly when coupled with local residence, broadcast experience, and past participation in civic affairs. Part-time participation is of lesser importance. Indeed, participation in station operation must be at least 20 hours a week for an applicant to receive integration credit. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (1979). Minority or female ownership and participation has also been considered by the Commission as other factors which enhance integration credit. *Horne Industries, Inc.*, 98 FCC 2d 601, 605 (1984). The Commission thus awards credit to minority or female owners who propose to be integrated by working at the station in a managerial role for significant amounts of time.

60. With respect to best practicable service, both JAM and Delta claim 100 percent full-time integration credit. JAM's claim is based on its proposal to integrate all its stockholders into full-time management positions at the station. Delta's claim is predicated on its proposal to integrate the sole owner of the corporate general partner, a 20 percent equity holder in the applicant, into the operation of the station as full time general manager.

61. Delta argues that JAM is not entitled to any integration credit because JAM filed its application as a Mississippi corporation, but later changed to a Delaware corporation. Because of this change, Delta argues that JAM has an "inchoate ownership"; that it did not seek Commission approval of a *pro forma* assignment to the new corporation; and that the applicant that applied as a Mississippi corporation has been dissolved and cannot now receive a grant, and, therefore, JAM is not entitled to integration credit.

62. Delta's arguments are totally lacking in merit, and they are rejected. JAM was organized as a Mississippi corporation, but later merged into a Delaware corporation with the same name. The ownership of the Delaware corporation is the same as the ownership of the Mississippi corporation with the shareholders, their equity ownership percentages, and the officers and directors, being identical. Under these circumstances, the fact that JAM began as a Mississippi corporation, and then became a Delaware corporation, is a matter lacking decisional significance. In this connection, the application form does not even require information as to the state of the applicant's incorporation.

63. Moreover, the cases relied upon by Delta are clearly distinguishable. In *Mason City Broadcast Company*, 3 FCC 116, 120 (1936), a partnership stated its intention to change its form to a corporation after it received the construction permit. The Commission noted that it was not being given the opportunity to pass on the qualifications of the entity that would hold the permit. In this case, the Delaware corporation was the applicant designated for hearing and has been prosecuting its application through the hearing process. It will hold the permit and operate the station,[6] a far different situation than *Mason City*. Moreover, in *The Lamar Broadcasting Co.*, 9 FCC 157 (1942) and *Metropolitan Broadcasting Corporation*, 5 FCC 501 (1938), two other cases relied on by Delta, the applicant corporations no longer existed. Here, the Delaware corporation, which is the applicant, does exist. In short, there is no merit to Delta's position that JAM is not entitled to integration credit.

64. JAM is entitled to 100 percent full-time integration credit because of its proposal to integrate its three stockholders into management- level positions. This credit is enhanced because all three stockholders are black, they have all been long-time residents of Jackson, and they have been active in numerous and varied civic and community affairs in Jackson. Also, JAM receives female enhancement credit in the amount of 66 2/3 percent.

65. Delta seeks 100 percent integration credit on the basis of its proposal to integrate Lesia Lammons, the sole principal of its corporate general partner, full time as the general manager of the station. JAM attacks the proposal asserting that Lammons is not a *bona fide* controlling principal, and that the Delta application is nothing but a sham.

66. The findings detail the origination and structure of the Delta application and identify the individuals who have been active in performing functions on behalf of the applicant. (*See* , paragraphs 34-49.) It is clear therefrom that Mr. McGuire and his law firm have been dominant in putting this application together with a minimum of involvement on the part of Ms. Lammons. Indeed, the decision to file the application was made by McGuire. The engineers were retained, a tower site selected, and cost estimates were prepared before Lammons joined the venture, and Lammons, the individual purportedly in full control, does not know who performed these functions. Furthermore, Lammons was contacted by McGuire by phone and asked to become the general partner. Lammons, who has no broadcast experience, and McGuire were total strangers. The application itself and the partnership agreement were signed by an attorney in the law office who was appointed secretary of the corporate general partner for this sole purpose. Lammons did not see the application before it was filed with the Commission.

67. Although Lammons testified in her direct testimony that the 80 percent/20 percent equity positions of the partners were "arrived at through negotiations between Ms. Lammons and Mr. McGuire," this was not true. There were no negotiations. Lammons was given a 20 percent interest on a take it or leave it basis. Moreover, Lammons has contributed100 to Delta and is not obligated to provide any other funds out of her personal resources. McGuire, on the other hand, is obligated to provide25,000 for pre-grant expenses and has already exceeded that amount. He is also obligated to provide50,000 for post-grant expenses. McGuire intends to exceed the50,000, if necessary, and it makes economic sense to do so. Finally, Lammons does not know on what basis the McFadden firm charges for its services or whether there is a retainer agreement. She has a similar lack of knowledge with respect to the engineering firm.

68. It is clear from the foregoing that no confidence can be placed in the assertion that Lammones is a *bona fide* controlling principal entitled to 100 percent integration credit. She has done practically nothing with respect to this application and has not made any significant decisions. McGuire and the law firm he retained have made all the important decisions regarding the Delta application, even going so far as providing someone to sign the application. In view of the findings demonstrating the lack of involvement on the part of Lammons, the purported *bona fide* controlling stockholder, the Presiding Judge is unable to award Delta the 100 percent integration credit it seeks. Lammons will not, by herself, control and influence the affairs of Delta without intervention on the part of McGuire or his law firm. Thus, no integration credit will be awarded Delta. *Magdalene Gunden Partnership*, 3 FCC Rcd 488 (1988); *Payne Communications, Inc.*, 1 FCC Rcd 1052 (1986); *N. E. O. Broadcasting Company*, 103 FCC 2d 1031 (1986); *Louisiana Super Communications Limited Partnership*, 102 FCC 2d 1293 (1985).

69. Delta relies on *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988). But *Victory Media* did not make a limited partner's activity in forming an applicant irrelevant. It merely held that the role of alleged passive investors in forming an applicant was not "necessarily dispositive" of the applicant's *bona fides*.

70. What *Victory Media* stands for is that an applicant is not to be regarded as a sham solely because a passive shareholder is involved in an applicant's formation. It does not countenance the total failure of a purported controlling principal to exercise any control over the applicant's affairs, as is the case with Lammons here.

71. Moreover, the facts in *Victory Media* are clearly distinguishable. In *Victory Media*, all out-of-pocket expenses were divided evenly among the voting stockholder and the two non-voting stockholders; the non-voting stock holder knew the voting stockholder for ten years and knew of her interest in a broadcast station; there were negotiations over the equity interest of the voting stockholder; the voting stockholder had an active role in the preparation of the application, she used her own judgment in selecting an engineer, and she worked closely with the engineer. When these facts are contrasted with the facts involving Delta, it is clear that *Victory Media* cannot serve as a basis for awarding 100 percent integration credit to Delta.

72. Even if Delta received credit for 100 percent integration, the enhancement factors would clearly favor JAM. JAM has 100 percent black ownership and 66 2/3 percent female ownership. Delta has 100 percent female ownership. It has been held that minority enhancement credit is more important than female enhancement credit. *WRLJ, Inc.*, 56 RR 2d 287 (1984); *Waters Broadcasting Corporation.*, 91 FCC 2d 1260 (1982); *affirmed sub. nom., West Michigan Broadcasting Co.* v. *FCC*, 56 RR 2d 104 (D.C. Cir. 1984). Also, the active involvement in local organizations on the part of the JAM principals is more extensive and significant than that pertaining to Ms. Lammons. Moreover, the long time local residence of Ms. Lammons is matched by Dr. Peoples, and the other JAM principals also have resided in Jackson, Mississippi, for at least seven years. As a result of all the foregoing, particularly the minority enhancement and local civic involvement on the part of the JAM principals, JAM is entitled to a moderate to substantial enhancement preference over Delta.

73. Finally, Delta argues that it is entitled to a moderate preference over JAM for service to underserved areas and a slight preference over JAM for overall area and population coverage. Delta would provide a fourth service to five more people and a fifth service to 1,803 more people than JAM. The extent to which Delta provides a fourth and fifth service is considered *de minimus*. Unless the service is delivered to substantial populations, not even a slight preference is warranted. *Christian Broadcasting of the Midlands, Inc.*, 99 FCC 2d 578, 583 (1984). With respect to overall population coverage, Delta will serve 1.35 percent (8,295) more people than JAM, which hardly can be considered a substantial population worthy of even a slight preference.[7] But even if Delta were awarded a slight preference for coverage, it would not override JAM's moderate to substantial enhancement preference.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[8] the application of JAM Communications, Inc., for a construction permit for a new commercial television station on Channel 51, at Jackson, Mississippi, IS GRANTED, and the competing application of Delta Television Limited IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Administrative Law Judge

FOOTNOTES

[1] *See* , *Orders* released August 6, 1987 (FCC 87M-1848) and September 24, 1987 (FCC 87M-2302).

[2] It is noted that Nichols did not meet the air hazard issue specified against his application.

[3] Information in this section is from JAM Ex. 3, unless otherwise noted.

[4] McGuire must first receive all the contributions made by McGuire except 400 percent of Lammons' capital contribution. Because the general partner has made a capital contribution of100 (JAM Ex. 11, p. 4), the amount is 400.

[5] It must be noted that no applicant will serve white areas or areas which only receive one or two other services.

[6] In *Mason City*, the applicant was also found legally unqualified because one of the partners was a corporation and, at that time, a corporation could not be a partner in a partnership.

[7] The cases relied upon by Delta appear to involve a much greater population difference.

[8] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-486

In re Applications of

JUNIATA COLLEGE BPED-870224MN
(hereafter Juniata)

MARY LOU MAIERHOFER BPH- 870224MP
(hereafter Maierhofer)

For Construction Permit for a
New FM Station, Channel 292A,
Huntingdon, Pennsylvania

HEARING DESIGNATION ORDER

Adopted: September 29, 1988; Released: October 26, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters*. On July 9, 1987, Beverly Lynn Eckardt (Eckardt) filed a "Motion to Dismiss Application" against Juniata. Eckardt contends that: (i) the Juniata application was unacceptable for tender because it specified a short-spaced transmitter site in violation of 47 C.F.R. Section 73.207; and (ii) in its April 6, 1987 amendment, Juniata "plagiarized" Eckardt's engineering data.

3. Eckardt indicates that Juniata's site is short-spaced to co-channel Class A station WNQQ(FM), Blairsville, Pennsylvania and thus violates Section 73.207 the Commission's Rules. Juniata, recognizing the short-spacing, filed a waiver request of Section 73.207 in its original application. Juniata subsequently, but within the thirty-day period following release of the Public Notice announcing the tenderability of its application, having learned of another applicant's filing for Huntingdon at a non short-spaced site, filed an amendment on April 6, 1987 to change its site so as to eliminate the short-spacing. The site chosen was arguably the same as that selected by Eckardt, whose own application was voluntarily dismissed on February 11, 1988. Eckardt concludes that this amendment corrects a tenderability defect and is thus unacceptable in that it was filed after the closing of the "window period."

4. On July 22, 1987, Juniata filed its "Opposition to the Motion to Dismiss Application." In this pleading, Juniata argues that: (i) the Commission's processing rules contemplate minor amendments which do not affect "tenderability" within the 30-day period after release of a notice of tenderability; and (ii) Eckardt's charge of plagiarism is meritless because, *inter alia*, Juniata itself has secured permission to use the site from its owner, Wilbur M. Dixon.

5. With respect to Eckardt's spacing allegation, Juniata is correct that because spacing is considered to be an "acceptability" rather than tenderability defect, short-spaced applicants may amend to remove short-spacing during the thirty day amendment period after release of a notice of tenderability. *See Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985), *recon. denied*, 50 Fed. Reg. 93157 (1985). *See also Donovan Burke*, 60 RR 2d 110 (1986).

6. Eckardt next alleges that Juniata is plagiarizing Eckardt's engineering in filing for the same site as proposed by Eckardt. First, Juniata secured approval from the landowner to build at that location if its application is granted. Thus, the property owner has indicated that he is favorably disposed toward making an arrangement. *See Docket 87 - 372*, 52 Fed. Reg. 35956 (1987). Furthermore, the Commission has stated that an applicant whose engineering data is used by another without authorization can adequately protect its property rights, if any, in court. *See Roanoke Christian Broadcasting, Inc.*, FCC 89-98, Mimeo No. 95176, released March 20, 1984. Therefore, Eckardt's "Motion to Dismiss Application" will be denied.

7. *Late - Filed Amendments*. The applicants below have petitioned for leave to file late-filed amendments on the dates shown. The accompanying amendments were filed after May 7, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Juniata	October 16, 1987, October 27, 1987
Maierhofer	May 18, 1987, October 28, 1987

8. *Coordinate discrepancy*. The geographical coordinates listed in Section V-G, Item 1 of Maierhofer's application (77° 57' 44") varies from those in Section V-B, Item 4 (77° 57' 42") by 2 seconds. A Commission engineering study has determined that Section V-G is incorrect and that the West Longitudinal coordinates should read 77 degrees, 57 minutes and 42 seconds as indicated in Section V-B.[2] This apparent typographical error will not affect the acceptability of Maierhofer's application, but she will be required to amend Section V-G so as to reflect the correct coordinates.

9. Juniata is applying for a non-commercial educational station on a commercial frequency. Juniata submitted its proposal on FCC Form 340, which does not require a 70 dBu (city grade) contour map or any calculations of distance to the 70 dBu contour. Non-commercial stations proposing to operate on a commercial channel must comply with regulations governing commercial station applications. Therefore, Juniata must amend its application within thirty days of the date of this order to specify the distances to its proposed 70 dBu contour and submit a map showing city-grade coverage in order to comply with the Note in 47 C.F.R. Section 73.315(a). An issue will be specified to determine whether Juniata's proposal would provide the required coverage of the city to be served, and, if not, whether circumstances warrant waiver of Section 73.315(a) of the Commission's Rules.

10. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Juniata's proposal would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicants IS GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Juniata.

14. IT IS FURTHER ORDERED That the "Motion to Dismiss Application" filed Eckardt against Juniata IS HEREBY DENIED.

15. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Juniata, Maierhofer.

16. IT IS FURTHER ORDERED, That in accordance with paragraph hereinabove, Juniata shall submit within thirty days of the release of this Order, an amendment showing its proposed 70 dBu contour and a map showing city-grade coverage.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The application of Beverly Lynn Eckardt, BPH-870224ML, was voluntarily dismissed on February 11, 1988.

[2] These coordinates are listed in the map plot attached as Exhibit V-2 to the application and in the applicant's FM spacing study.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-482

In re Applications of

ILLINI BROADCASTING, INC. (hereafter: Illini) File No. BPH-880107MM

ANN C. MANSFIELD D/B/A TAOS COUNTY RADIO (hereafter: TCR) File No. BPH-880107NF

For Construction Permit for a New FM Station on Channel 260A in Taos, New Mexico

HEARING DESIGNATION ORDER

Adopted: September 30, 1988; Released: October 26, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Illini and TCR petitioned for leave to amend their applications on the dates specified below. The accompanying amendments were filed after March 25, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT
Illini	May 10, 1988
TCR	July 11, 1988

3. Section II, item 4(a), FCC Form 301 (October 1986) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. TCR has not completed item 4(a) correctly. The TCR application gives only a city and state address for Bonnie Gignac. Accordingly TCR must submit amendment which gives all the information required by Section II, item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Illini and TCR ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

7. IT IS FURTHER ORDERED, That TRC will submit an amendment which contains the information required by Section II, item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this order is released.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-481

In re Applications of

MICHAEL R. BARNETT & ROBERT L. TERRY D/B/A HAZARD BROADCASTING SERVICES (hereafter: HBS)	File No. BPH-870327ML
C&F BROADCASTING, LTD. (hereafter: C&F)	File No. BPH-870330MM
HAZ BROADCASTING, INC. (hereafter: Haz)	File No. BPH-870331PK
BLACK GOLD BROADCASTING, INC. (hereafter: Black)	File No. BPH-870402MC
PERRY BROADCASTING (hereafter: Perry)	File No. BPH-870316MA (Previously Dismissed)

For Construction Permit for a
New FM Station on Channel 284A
in Hazard, Kentucky

HEARING DESIGNATION ORDER

Adopted: September 30, 1988; Released: October 26, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter*. On May 19, 1987, Perry's application was returned for 10 tenderability defects. Eight of the 10 related to Perry's failure to supply the information regarding its proposed tower/antenna as requested in Section V-G of FCC Form 301 (January 1982). The only information Perry provided with respect to this section consisted of the statement, "Tower Facility Existing on File with F.C.C.," made in response to the "Facilities Requested" item in Section V-G. On June 22, 1987, Perry filed a Petition for Reconsideration of the return of its application on the grounds that the tower/antenna information was on file in the "TV Section" of the FCC with the license of Hazard Television Company, Inc. for WKYH-TV (File No. BPCT-3996). An Opposition to Petition for Reconsideration was filed by Haz on July 16, 1987. Under the "hard look" doctrine adopted in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985), if missing or inconsistent information can be derived "confidently and reliably, drawing on the application as a whole," *Joanne Brehm*, 1 FCC Rcd 403 (1986), a defect would not render an application insufficient for tender. In the instant case, however, it was not possible to derive the missing information "confidently and reliably" by drawing on Perry's defective application. Further, Perry's late provision of the necessary information in its Petition for Reconsideration can not remedy the initial omission in the application itself as tenderability defects cannot be cured after the close of the pertinent filing window. *See* Para. 31 and Appendix D of the *Report and Order* in Docket 84-750; *see also Star Signal Corporation*, 1 FCC Rcd 450 (1986). Accordingly, Perry's Petition for Reconsideration of the return of its application will be denied.

3. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Black has filed such statement, it is deficient. Black has not listed a specific women's organization for recruitment purposes. Accordingly, Black will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

4. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Haz and Black have not completed Item 4 correctly. Haz's application gives a post office box number as the residence address for Gwendolyn Combs and Michael R. Wilson. Black's application gives a post office box number as the residence address for Kenneth R. Finnission and Danny S. Maggard. Accordingly, Haz and Black must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

5. C&F petitioned for leave to amend its application on July 28, 1987. The accompanying amendment was filed after June 29, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Perry IS DENIED, and its resubmitted application IS DISMISSED.

9. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Black shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

10. IT IS FURTHER ORDERED, That within 30 days after the release of this Order, Haz and Black shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge.

11. IT IS FURTHER ORDERED, That the petition for leave to amend filed by C&F IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-484

In re Applications of

ERATH BROADCASTING, A PARTNERSHIP IN COMMENDAM (hereafter EB) — File No. BPH-851230MM

KEITH FREDERICK, *ET AL.* d/b/a SOLO MUSIC COMPANY OF LOUISIANA, LTD. (hereafter Solo) — File No. BPH-851231MM

JAY-WINN BROADCASTING, LTD. (hereafter Jay-Winn) — File No. BPH-860102MU

TRI-PARISH BROADCASTING LIMITED (hereafter Tri-Parish) — File No. BPH-860102QD

For Construction Permit for a New FM Station on Channel 225A in Erath, Louisiana.

HEARING DESIGNATION ORDER

Adopted: September 30, 1988; Released: October 26, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The *Report and Order* in MM Docket 87-104, 3 FCC Rcd 4611 (1988), amends the FM Table of Allotments, 47 C.F.R. § 73.202(b), changing the allotted channel for the instant Erath, Louisiana, allocation from Channel 225A to Channel 299A. The *Report and Order*, therefore, requires the applicants for Channel 225A at Erath, Louisiana to amend their applications to reflect Channel 299A. Accordingly, the applicants in this proceeding will be ordered to submit amendments in compliance with the *Report and Order* in MM Docket 87- 104 to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. It should be noted that due to the late tenderability period opened on May 13, 1988 by applicant Tri-Parish, various amendments filed by the competing applicants, which otherwise would have been late-filed will be considered filed as of right, and therefore will be afforded full comparative advantage. *See Memorandum Opinion and Order*, reconsideration in Docket 84-750, 50 Fed. Reg. 43157 (1985).

4. *EB.* EB proposes to collocate its antenna on an existing tower owned by Cal's Communications Service, Inc. which is presently being used by two-way radio service KTQ-370, but its application contains coordinates for that tower which are inconsistent with those contained in Commission records. According to the Commission's data base, the accepted coordinates for this tower are 30' 02' 54" North Latitude, 91' 59' 49" West Longitude. EB's site map correctly plots these coordinates; however, in Section V-B, Item 4 and Section V-G, Item 1 of FCC Form 301, Erath lists the geographic coordinates of the tower as 30' 02' *59"* North Latitude, 91' 59' 49" West Longitude, which results in a discrepancy of 5 seconds for the North Latitude coordinate. Because EB clearly proposes to locate on an existing tower licensed to another Commission licensee, and because specific reference is made to this existing tower in the application in question, the staff could, drawing on the application as a whole, confidently and reliably verify the transmitter location incorrectly listed in EB's application by taking official notice of the site coordinates found in the Commission's records for the licensed collocated facilities. Accordingly, EB's application is acceptable for filing; however, EB will be required to file a corrective amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

5. *Tower Height Discrepancy.* Jay-Winn also proposes to collocate its antenna on the existing tower owned by Cal's Communications Service Inc., which is presently being used by two-way radio service KTQ-370. The tower data submitted in Section V-G of FCC Form 301 in Jay-Winn's application, however, is inconsistent with that contained in the Commission's records. In Item 5, Section V-G of FCC Form 301, Jay-Winn lists the overall height above ground level (AGL) of the tower as 161 meters. Commission records show that the existing tower has a height of 178 meters AGL. Because Jay-Winn proposes to locate on an existing tower licensed to an existing Commission licensee, and because specific reference is made to this existing tower in Jay-Winn's application, the staff could confidently and reliably verify the pertinent tower height by taking official notice of the tower parameters found in the Commission's records for the licensed facilities. Accordingly, Jay-Winn's application is acceptable for filing. However, Jay-Winn will be required to file an amendment with the presiding Administrative Law Judge, within 30 days of the release of this Order, correcting the tower height listed in its proposal.

6. In response to Section VI, FCC Form 301, the applicant below has indicated that it will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), the applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the 5-point Model EEO Program. The EEO program submitted by the following applicant is incomplete or is otherwise deficient in the manner described below. Accordingly, the listed applicant will be required to file an amended EEO Program with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANT	DEFICIENCY
Tri-Parish	Failed to identify specific publications it will utilize in attracting women and minority candidates.

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicant has been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by the applicant below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding. APPLICANT: Tri-Parish.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Tri-Parish would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That EB, Solo, Jay-Winn and Tri-Parish shall submit amendments in accordance with paragraph 2 hereinabove in order to comply with the *Report and Order* in MM Docket 87-104, 3 FCC Rcd 4611 (1988).

12. IT IS FURTHER ORDERED, That EB shall submit an amendment in accordance with paragraph 4 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That Jay-Winn shall submit an amendment in accordance with paragraph 5 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Tri-Parish shall submit Section VI information in accordance with the requirement of 47 C.F.R. § 73.2080(c) to the presiding Administrative Law Judge.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TEL-RAD MESSAGE CENTER, INC. File No. 20646-CD-MD-86

For an extension of time in which to construct a second facility for Station KEC520 on the frequency 152.15 MHz at Newburgh, New York

MEMORANDUM OPINION AND ORDER

Adopted: October 18, 1988; Released: October 27, 1988

By the Chief, Common Carrier Bureau:

1. Tel-Rad Message Center, Inc. (Tel-Rad) has filed a petition for reconsideration of the decision of the Chief of the Mobile Services Division which denied Tel-Rad's request for a one year extension of time in which to construct the captioned facilities. Tel-Rad requested that the construction period be extended from December 8, 1985 until December 8, 1986. By letter dated February 6, 1986, the Chief of the Mobile Services Division noted that Tel-Rad previously had been granted an extension of time from August 1, 1985 until December 8, 1985 to construct the 152.15 MHz facility at Newburgh, New York. The Chief of the Mobile Services Division decided that grant of this first request had afforded Tel-Rad sufficient time for completion of construction. Therefore, the request for a second extension of time was denied and the construction permit was forfeited.

2. In its petition for reconsideration, Tel-Rad argues that an extension is warranted because it has been diligently attempting to resolve serious technical problems which have been entirely beyond its control. Tel- Rad contends that if it is not allowed to complete construction the spectrum will remain fallow because no other carrier could construct facilities at Newburgh without causing co-channel interference to Tel-Rad's already existing facilities at Middletown, New York.

3. In support of its petition, Tel-Rad submitted a chronology listing the problems and remedial measures taken by its equipment supplier. This supplement indicates a number of software and hardware problems with the two terminals Tel-Rad intended to use for simulcasting Newburgh with Middletown. Because of these problems and with no assurance that they could be solved, Tel-Rad states it "was reluctant to order the equipment for the Newburgh site." Now that the technical difficulties have been resolved, Tel-Rad wishes to complete construction and serve the public.

4. Tel-Rad has failed to present us with evidence to support grant of a second extension of time within which to construct the proposed facilities. Tel-Rad's original application for a construction permit at Middletown was filed January 16, 1980, File No. 20859-CD-P/ML-01-80. In that application, Tel-Rad proposed a second location for Station KEC520 at Newburgh, New York. After petitions against that application and associated applications were resolved, the Commission issued a construction permit to Tel-Rad on June 8, 1984, with an expiration date of June 8, 1985. Tel-Rad made a decision to upgrade the facilities in 1984 to provide a simulcast system with alpha-numeric capability. Tel-Rad explains that it did not want to order equipment for Newburgh until the Middletown facility was completed.

5. Section 22.43 of the Commission's rules provides that extensions of time in which to complete construction will be granted only if the licensee shows that the failure to complete construction is due to causes beyond the licensee's control. It further provides that no extension will be granted for failure to timely order equipment. 47 C.F.R. §22.43(b)(1). The decision to postpone ordering equipment for Newburgh was not due to reasons beyond the control of Tel-Rad. The technical problems that Tel-Rad was having with its terminal equipment at Middletown did not prevent it from ordering equipment and installing the transmitter and antenna at Newburgh within the terms of the authorization.

6. Accordingly, IT IS ORDERED, that Tel-Rad's request for reconsideration IS DENIED and the decision of the Chief of the Mobile Services Division IS AFFIRMED.[1]

7. This action is taken under Section 0.291 of the Commission's rules and is effective on the date of release. Applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Tel-Rad has not been barred from submitting a new application for the frequency in question, and it may still do so. If it chooses to file a new application, we will act on it as expeditiously as possible.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-326

In the Matter of

Access Tariff Filing Schedules

ERRATUM

Released: October 27, 1988

1. In the Report and Order in the above-entitled matter, released September 14, 1988, FCC 88-283, the following typographical error requires correction.

2. Appendix B, Section 69.205(e)(4), should read "July 1, 1991 through June 30, 1992 - .955."

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released October 7, 1988

NOTICE TO FILE COMMENTS ON CONTINUED APPLICATION OF COMMISSION'S RESALE POLICY

On March 14, 1986, CTC, the nonwireline licensee in New York City, filed a letter petition requesting a declaratory ruling permitting it to refuse to provide resale service to NYNEX-R, the wireline licensee in New York City. CTC argued that such action would serve to enhance competition and further the objectives of the antitrust laws. It maintained that the underlying policy considerations of the Commission's pro-resale policies did not apply in this case, and that competition would be injured if it were required to allow NYNEX-R to resell on its system.

In an April 17, 1986 letter, the Common Carrier Bureau required CTC to provide resale service to NYNEX-R. CTC filed an application for review of the Bureau's letter and the DOJ filed comments in support of CTC's application for review.

In its application for review CTC claimed that restrictions on resale are permissible under the antitrust laws and, in fact, are pro-competitive if they stimulate facilities-based competition. While CTC conceded that resale activity generally promotes competition in the cellular marketplace, it contended that such competition is secondary to the facilities-based competition between nonwireline and wireline cellular carriers. It asserted that where, as here, facilities-based competition will be harmed by resale activities, such resale is contrary to the public interest and should not be required. Second, CTC maintained that forcing it to accept NYNEX-R as a reseller would undermine CTC's strategy of "establishing distinctive and superior channels of distribution" and "hinder CTC's ability to distinguish its system from [NYNEX-R's]," thereby confusing customers. Third, CTC argued that, NYNEX-R, as a reseller, would be able to obtain increased information about CTC's marketing plan that normally would not be available to it as a competitor, and similarly, that once NYNEX-R places a large customer base on the CTC system, it will have the ability to injure CTC by threatening to withdraw its resale customers.

The DOJ supported CTC's position and also argued that allowing firms to select their distribution channels generally enhances efficiency and consumer welfare; CTC's refusal to permit NYNEX-R to resell CTC services will not harm competition; the Commission's policies should foster only facilities-based competition; and in the absence of a clear market failure, the Commission should not interfere with a carrier's business judgment.

On October 7, 1988, the Commission released a Memorandum Opinion and Order affirming the Bureau's determination that its current resale policy required CTC to offer resale service to NYNEX-R. However, the Commission indicated it would explore these issues further by treating the CTC application for review and DOJ comments in support as petitions for rule making and inviting comments concerning the extent to which the Commission should continue to apply its resale policy.

A copy of CTC's application for review and the DOJ's comments may be reviewed at the Mobile Services Division, Public Reference Room, Room 628, 1919 M Street, N.W., Washington, D.C. 20554. Interested parties are invited to file comments in response to these pleadings on or before December 7, 1988. Reply comments may be filed on or before January 6, 1989. An original and 5 copies shall be filed with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. All comments and replies shall reference the following number: RM 6539.

For further information, contact Anne Moebes at (202) 632-6450.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-266

In the Matter of

TELEPHONE COMPANY
CABLE TELEVISION
Cross-Ownership Rules,
Sections 63.54 - 63.58.

ORDER

Adopted: October 18, 1988 Released: October 19, 1988

By the Chief, Common Carrier Bureau:

1. Before the Chief, Common Carrier Bureau are requests filed by the the Massachusetts Community Antenna Television Commission (MCATV), the Community Antenna Television Association (CATA), the Association of Independent Television Stations, Inc. (INTV), and the National Association of Broadcasters (NAB) for extensions of time in which to file comments in response to *Further Notice of Inquiry and Notice of Proposed Rule Making (Further Notice)*, CC Docket 87-266, FCC 88-249, released September 22, 1988. That decision tentatively concluded, among other things, that telephone companies should no longer be barred from providing video programming in their telephone service areas provided certain regulatory conditions are met. MCATV requests an extension of forty-five days in which to file comments, CATA and INTV sixty days, and NAB ninety days. Comments and reply comments are currently due on November 1, 1988, and November 28, 1988, respectively. Buckeye Cablevision, Inc., *et al.*, (Buckeye)[1] has filed comments in support of the CATA request; the United States Telephone Association (USTA) has opposed it.

2. MCATV states that it is seeking information from officials throughout the state, including expert technical opinion, on the impact of allowing telephone company entry into the video marketplace. It states that additional time is necessary to judge the vast legal, technical and economic consequences implicated by the *Further Notice*. INTV states that it has accepted an invitation from USTA for their respective Boards of Directors to meet and discuss the issues raised in this proceeding. Until this meeting takes place, it will not be possible for it to take a definitive position on those issues, INTV states. INTV has determined that it will not be possible for this meeting to take place until mid or late November. Therefore, it requests an extension of sixty days. NAB states that the *Further Notice* requests comment on issues which could change the future of over-the-air television service. Many complex, critical issues must be analyzed in order to develop comments, NAB states. In addition, NAB avers, its Board of Directors will not meet until January 16, 1989 at which meeting it will discuss the issues raised in this proceeding.

3. CATA states that the Commission has asked for comment on a multitude of significant and complex questions regarding the future provision of cable television and other broadband services. Many of the issues raised, such as the application of the *Modification of Final Judgment*, the appropriateness of *Computer III* safeguards for cable television service, First Amendment issues, Federal/State jurisdiction, could each be the subject of an extensive Commission inquiry, according to CATA. Compilation and detailed analysis of financial and economic data is necessary, it asserts, to adequately address issues raised by the Commission, and information not presently available has to be obtained, such as records of numerous state actions in which cable operators were denied authorizations to provide additional service. Accordingly, states CATA, an additional sixty days is necessary to evaluate the *Further Notice*, conduct necessary studies, gather relevant information, and develop responsive and informative comments that will support the Commission's efforts to formulate a well reasoned decision.

4. Buckeye states that CATA has correctly described the complexity of the numerous issues raised in the *Further Notice* and has demonstrated that additional time is necessary to develop and analyze information for thorough and responsive comments. Opposing the CATA request, USTA states that the issues involved in this proceeding have been on the record for over a year, and that the Commission in the *Further Notice* has focused on a relatively narrow range of concerns. There is an insufficient basis for an extension of time, argues USTA.

5. Good cause for an extension of time may be shown by, *inter alia*, subject matter of an unusually complex or technical nature. *Public Notice*, Mimeo No. 6963, September 5, 1978, 4 Rad. Reg. 2d (P &F) 86 (1978). CATA, MCTAV, INTV, Buckeye and NAB have generally identified matters which are financially, technically, and legally complex and interrelated. An extension of time of thirty days will promote development of responsive comments and will not unduly delay the Commission's deliberations in this proceeding. The Bureau finds that these factors establish good cause for a thirty day extension of time in which to file comments. This additional time for comments, plus the time period for reply comments, will constitute a total combined comment period fully adequate to respond to the issues raised by the *Further Notice*. Parties have failed to show that longer extensions are justified. In particular, scheduling or administrative concerns will not generally show good cause for an extension of time. *Public Notice*, *supra*. Accordingly, we are not persuaded by NAB's and INTV's contentions to the contrary.

6. Accordingly, IT IS ORDERED, that the requests for an extension of time filed by the Massachusetts Community Antenna Television Commission, the Community Antenna Television Association, the Association of Independent Television Stations, and the National Association of Broadcasters ARE GRANTED to the extent indicated above. Comments are due December 1, 1988. Reply comments are due December 28, 1988.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Buckeye Cablevision, Inc., Comcast Corporation, Cox Enterprises, Inc., Metrovision, Inc., NewChannels Corporation, Prividence Journal Company and Sammons Communications, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paul Kelley d/b/a
AMERICAN TELTRONIX
Licensee of
Station WNHM552

ORDER EXTENDING TIME

Adopted: October 20, 1988; Released: October 21, 1988

By the Chief, Private Radio Bureau:

1. On October 7, 1988, Mobilfone of Northeastern Pennsylvania, Inc. (Mobilfone) filed a petition for reconsideration of the *Memorandum Opinion and Order* released by the Commission on September 7, 1988, 3 FCC Rcd (FCC 88-282). Mobilfone's petition, however, was not served upon Paul Kelley d/b/a American Teltronix (AMTEL) in a timely manner. Although AMTEL expects to file its opposition within the time period mandated in § 1.106(g) of our Rules, 47 C.F.R. §1.106(g), it has requested an extension of time as a precautionary measure. Furthermore, AMTEL states that Mobilfone does not object to the requested extension of time.

2. Accordingly, good cause having been shown therefor, IT IS ORDERED, pursuant to the authority set forth in Sections 1.46 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.46 & 1.106, that the time period for filing an opposition to the petition for reconsideration in the above-captioned proceeding is hereby extended one week to Thursday, October 27, 1988.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-475

In the Matter of

Amendment of Part 22 of the Commission's Rules and Regulations to Allow Public Mobile Service Applicants to Commence Construction After Filing Form 401, but Prior to Receiving an Authorization — RM-5554

NOTICE OF PROPOSED RULE MAKING

Adopted: September 27, 1988; Released: October 27, 1988

By the Commission: Commissioner Dennis concurring and issuing a statement.

1. By this Notice of Proposed Rule Making, we propose to revise Section 22.43(a)(1) of the Commission's Rules, which requires an applicant in the Public Mobile Service (PMS) to file a Form 401 and receive an authorization prior to undertaking the construction of certain facilities. Specifically, we propose amending Section 22.43(a)(1) to permit all PMS applicants to commence construction of their proposed facilities, prior to receiving a grant of their Form 401 application, so long as certain conditions, discussed below, are satisfied. The revision is proposed in response to a Petition for Rule Making filed by the Radio Common Carrier Division of Telocator Network of America (Telocator).[1] Comments were filed by BellSouth Corporation; NewVector Communications, Inc. (NewVector); McCaw Communications Companies, Inc. (McCaw); Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West); Pacific Bell and Nevada Bell (Pacific); Paging Network, Inc.; and Southwestern Bell Telephone Company (Southwestern Bell). Reply comments were filed by Metromedia, Inc. (Metromedia) and Telocator.

2. Telocator argues that scheduling tower construction and antenna installation is difficult because of the small number of companies involved in such work. Scheduling is further complicated by weather and seasonal limitations. Telocator states that if PLMS applicants could begin construction at their convenience, rather than waiting to receive the authorization, several construction jobs could be consolidated and handled at one time. Such consolidation may lead to lower costs which could, in turn, be passed on to customers. Furthermore, preconstruction would enable PLMS licensees to begin providing service to the public more quickly. Telocator proposes that before beginning construction applicants would comply with any air safety regulations, and that preconstructing applicants would assume the risk of not receiving an authorization.

3. NewVector and McCaw support the Telocator proposal and propose applying it to cellular radio facilities. Pacific, Southwestern Bell, and US West voice the concern that inefficiencies may occur where two applicants initiate construction on the same frequency in the same area. In response to this concern, Telocator suggests a modification to its proposal under which applicants may initiate construction on the 31st day after the application has been placed on public notice, so long as no petitions to deny or mutually exclusive applications have been filed. US West proposes a 60 day period. Southwestern Bell argues that applications may be found mutually exclusive even after the 30 day public notice period and therefore suggests a rule allowing construction only 90 days after the public notice date. Metromedia supports the Telocator proposal for immediate preconstruction but only after the antenna site is cleared under air safety rules and provided that no Commission action is required under the environmental impact regulations of 47 C.F.R. Section 1.1301.

DISCUSSION

4. Section 319(d) of the Communications Act of 1934, 47 U.S.C. Section 319(d), provides in part that "[a] permit for construction *shall not be required* for . . . stations licensed to common carriers, unless the Commission determines that the public interest, convenience, and necessity would be served by requiring such permits." (emphasis added). In the PMS, although we have eliminated construction permits, Section 22.43(a)(1) of the Rules still requires authorization prior to construction.[2]

5. In the *Part 22 Update Order*,[3] we established a one-step licensing process in the PMS. Section 22.43(a)(1) of the Rules. Under this system, an applicant need no longer file both a construction permit and license application. Rather, an applicant (except initial wireline cellular applicants) receives a license when its initial application is granted, and then upon completion of construction merely notifies the Commission that it has completed construction in conformance with the proposal. Upon such notification, the previously granted license will encompass authority to operate.

6. When we adopted the one-step licensing procedure, we rejected a proposal to replace the two-step process completely and to rely on mere notification. We stated that since "the current requirement that applicants obtain authorization prior to construction guarantees efficient spectrum allocation and utilization, we find it is in the public interest to retain that requirement *for the time being*. " *Part 22 Update Order*, 95 FCC 2d at 773 (emphasis added).

7. Subsequently, in the *TeleStar Designation Order*,[4] the Common Carrier Bureau (Bureau) provided the following reasons for maintaining the prior authorization requirement for microwave facilities: (1) to provide the Commission with information on the location and nature of the proposed facility; (2) to ensure that applicants complete their frequency coordination process prior to construction; (3) to ensure compliance with air safety and environmental regulations; and (4) to coordinate certain proposals with stations in Canada and Mexico.

8. We believe that the concerns stated in the *TeleStar* proceeding are relevant in the PMS context. We tentatively conclude, however, that those concerns, as well as additional ones, can be addressed by the conditions proposed below which are less restrictive than the prior au-

thorization requirement. Moreover, we tentatively conclude that the preconstruction authorization requirement of Section 22.43(a)(1) may no longer serve the public interest. As Telocator and the commenters have argued, the requirement appears to have restricted the flexibility of applicants in scheduling construction and antenna installation. Elimination of the preconstruction authorization requirement could encourage the consolidation of several installation and construction jobs that would reduce construction costs thereby leading to lower rates. We believe that allowing preconstruction should also result in more expeditious delivery of service to the public. The proposed rule could promote greater efficiency and is consistent with the Commission's efforts to eliminate unnecessary regulations.

9. *Informationon Preconstructed Facilities and Frequency Coordination.* Unlike the simple notification proposal[5] that the Commission declined to adopt in the *Part 22 Update Order*, in this proceeding we propose to require the applicant to file a completed Form 401 prior to starting construction. The receipt of this form will enable us to have all the necessary information about the proposed facility on file. Furthermore, in preparing the Form 401, the applicant will have to complete the frequency coordination or show non-interference with existing and previously proposed stations, thus ensuring "efficient spectrum allocation and utilization." *See Part 22 Update Order*.

10. *Mutually Exclusive Applications and Petitions to Deny - the 90 Day Proposal for Non - Cellular Facilities.* Although several applicants may apply for a PMS frequency in a given market, only one of these applicants can receive an authorization to operate their facility. If we permit all PMS applicants to commence construction of their proposed facilities prior to receipt of a grant of their Form 401 application, we are concerned that those applicants for that frequency in that same area whose Form 401 is not granted may have begun construction but would not be allowed to operate their facility. In order to avoid this outcome, we propose that an applicant may only begin construction before grant of its Form 401 application if, after the period for filing mutually exclusive applications and petitions to deny has expired, no mutually exclusive applications or petitions to deny have been filed.

11. At issue is how long an applicant must wait to determine that mutually exclusive applications or petitions to deny have been filed. Petitions to deny must be filed within 30 days after the date of public notice announcing the acceptance for filing of an application. 47 C.F.R. Section 22.30(a)(4). Mutually exclusive applications generally must be filed within 60 days of the date the application is announced by public notice. 47 C.F.R. Section 22.31(b)(2)(i). Therefore, one alternative would be to allow preconstruction to begin on the 61st day after the public notice date. However, problems may arise with the 60 day proposal in that the possibility still exists for an applicant mistakenly to preconstruct a facility which is later found to be mutually exclusive with another proposal. Mistaken preconstruction may also be caused by occasional errors in the public notice listing of proposals accepted for filing, or by the cut-off effect of the "daisy chain" rule.[6] Furthermore, there is typically two to four weeks between the time an application is filed and the time it appears on public notice as accepted for filing, thereby making it possible for an applicant to be unaware that another applicant has filed in the same frequency.

12. With these considerations in mind, Southwestern Bell has proposed as a second alternative to require an applicant to wait until the 90th day after the public notice date, to determine that no mutually exclusive application or petition to deny has been filed. The 90 day proposal takes into account the 30 day period for filing petitions to deny, the 60 day period for filing mutually exclusive applications and the time lag or errors that may occur with the public notice listing of an application. We incorporate the 90 day condition into the proposed rule. Our 90 day proposal, however, may place certain additional burdens on the applicant. First, any non-cellular applicant that intends to begin construction before receiving an authorization will have to perform one interference study before filing the Form 401, and may have to perform a second interference study after the 90 day period has passed. The additional study is prudent in order to determine whether any competing applications have been filed in the interim. Second, if an error or time lag in the public notice system is not corrected within the 90 day period, applicants will assume an additional and unpredictable risk.

13. *The 60 Day Proposal for Cellular Facilities.* Cellular applications are treated differently from conventional PMS applications. Date certain filing periods have been established for initial applications and a single tentative selectee is chosen in each market. Thus no new, mutually exclusive applications can be submitted after the filing period or after the tentative selectee is chosen. However, petitions to deny may be filed within 30 days after the public notice announcing the tentative selectee. *See* 47 C.F.R. Section 22.30(a)(4). We propose a sixty day waiting period, from the date of the public notice of the tentative selectee, before pre-authorization construction may begin. The 60 day proposal takes into account the 30 day period for filing petitions to deny and another 30 days for any time lag or errors that may occur in the public notice system.

14. *Defective Applications.* If a major defect is found in an application, we propose that the application be returned, without opportunity to amend, as unacceptable for filing. *See* 47 C.F.R. Section 22.20. In such circumstances the applicant would not receive an authorization, and could not operate its preconstructed station. We propose that the applicant also assume the risk for other defects, such as the antenna height being higher or lower than authorized, that may result in the tower having to be moved.

15. *Air Safety Regulations.* We agree with the commenters that applicants should comply with air safety requirements prior to construction. We propose that before beginning to construct, the applicant must either determine that notice to the Federal Aviation Administration (FAA) is not required, see 47 C.F.R. Sections 17.7 to 17.17, or notify the FAA of the proposed construction and obtain marking and lighting specifications from the Commission.

16. *The National Environmental Policy Act of 1969*, 42 U.S.C. Sections 4331-4335 (implemented by Commission rules, 47 C.F.R. Sections 1.1301-1.1319). We propose that all applicants determine whether the proposed facility may have a significant environmental effect as set forth in 47 C.F.R. Section 1.1307, and indicate that determination in response to Question 32 of Form 401.[7] We propose that the applicant may not construct prior to receiving an authorization if the applicant determines that the facility

may have a significant environmental effect. *See also Amendment of Environmental Rules (NPRM)*, Gen. Docket No. 88-387, FCC 88-265 (released 1988).

17. *Canadian Clearance*. Coordination with Canada is generally required for facilities built near the United States-Canadian border.[8] Under Section 22.117(b)(2), governing fill-in stations, this problem is avoided by requiring that construction be on the United States side of lines A and C.[9] Therefore, we propose to observe the same policy regarding preconstructing without prior authority.

18. *Mexican Clearance*. A similar problem exists concerning preconstructed cellular facilities near the Mexican border. Under an informal agreement between the United States and Mexico, coordination would be required for cellular systems located within 45 miles of the Mexican border. Accordingly, under our proposal, cellular systems may not be constructed prior to receiving an authorization unless the proposed cellular system is at least 45 miles away from the United States-Mexican border.

19. *Modification of Forms*. Finally, we request comments on how the FCC forms should be modified to accommodate the proposed rule change. For example, it may be appropriate to change FCC Form 401 or the existing authorizations granted to a preconstructing applicant.

REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

20. *Reason for action*. The Commission is proposing to remove the requirement that PMS applicants receive an authorization prior to the construction of facilities.

21. *Objective*. The objective of this proposal is to give applicants greater flexibility in scheduling construction and enable licensees to begin providing service to the public more quickly. The proposed rule may also result in reduced costs for both the licensees and the public. The rule would also help further the Commission's goal of eliminating unnecessary regulation.

22. *Legal basis*. The authority for this proposed Rule Making contained in Sections 1, 4(i), 201, 202, 220, 301, 303, and 319(d) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 201, 202, 220, 301, 303, and 319(d).

23. *Description, potential impact and number of small entities affected*. The proposed Rule Making will have a minimum impact on small entities by providing them with increased flexibility in the scheduling and consolidation of construction jobs thereby reducing construction costs and expediting the initiation of service to the public by Public Mobile Service licensees.

24. *Reporting, record keeping, and compliance requirements*. None.

25. *Federal rules which overlap, duplicate or conflict with these rules*. None.

26. *Any significant alternative minimizing impact on small entities and consistent with stated objectives*. A significant alternative presented in the item is whether before an applicant can commence construction it must wait 60 or 90 days after the application has been filed and placed on public notice.

27. Interested parties shall file an original and 5 copies of all comments, replies, or other documents. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the public who wish to express their interest by participating informally in the Rule Making proceeding may do so by submitting one copy of the comments provided that the docket number is specified in the heading. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C. For general information on how to file comments, parties should contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

EX PARTE

28. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. Section 1.1203.

29. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. Section 1.1206.

PAPERWORK REDUCTION ACT

30. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found not to be subject to that Act.

31. Accordingly, pursuant to Sections 1,4(i), 201, 202, 220, 301, 303, and 319(d) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 1,4(i), 201, 202, 220, 301, 303, and 319(d) Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553, that there is ISSUED A NOTICE OF PROPOSED RULE MAKING.

32. Pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. Section 1.415, that all interested persons may file comments on the matters discussed in this Notice and the proposed rule changes contained in Appendix A below by **December 19, 1988** and reply comments by **January 3, 1989.**

33. The Chief, Common Carrier Bureau, has delegated authority to request the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

34. Also, the Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (5 U.S.C. Section 601, *et seq.*).

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX
Prosposed Rule Section

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 22.43 is amended by revision paragraph (a)(1) to read as follows:

Section 22.43 Period of construction.

(a)(1)(i) Non-Cellular facilities. Once an applicant has filed a Form 401 with the Commission and 90 days have elapsed from the date the application is listed on public notice as acceptable for filing, the applicant may commence construction, provided that:

(A) the application is not mutually exclusive with another application and no petition to deny has been filed;

(B) the applicant has not requested waiver of a Commission rule pursuant to Section 22.19;

(C) the applicant has either determined that notice to the Federal Aviation Administration (FAA) is not required, see Sections 17.7 ti 17.17 of the rules, or has notified the FAA of the proposed construction and received marking and lighting specifications from the Commission;

(D) the applicant has considered whether the facility may have a significant environmental effect in accordanced with Sections 1.1301-1.1319 of the rules, determined that it will not, and indicated that determination on the Form 401, and

(E) the applicant had determined that the facility will be on the United States side of lines A and C. See Section 22.177(b)(2).

(ii) Cellular Facilities. Once 60 days have elapsed from the date of public notice announcing the tentative selectee for a particular market, the tentative selectee may commence construction provided that:

(A) no petitions to deny have been filed:

(B) the tentative selectee has not requested waiver of a Commission rule pursuant to Section 22.19;

(C) the applicant has either determined that notice to the Federal Aviation Administration (FAA) is not required, see Sections 17.7 ti 17.17 of the rules, or has notified the FAA of the proposed construction and received marking and lighting specifications from the Commission;

(D) the applicant has considered whether the facility may have a significant environmental effect in accordanced with Sections 1.1301-1.1319 of the rules, determined that it will not, and indicated that determination on the Form 401, and

(E) the tentative selectee has determined that the facility will be on the United States side, and at least 45 miles away, from the United States-Mexican border.

(iii) Applicants who commence construction prior to receiving an authorization, pursuant to Section 22.43(a)(1)(i) and(a)(1)(ii), assume the risk of:

(A) not receiving an authorization;

(B) errors and time lags in the public notice systems;

(C) having to alter, relocate or dismantle the facility; and

(D) incurring whatever costs may be necessary to bring the

* * * * *

FOOTNOTES

[1] We note, however, that Telocator requested that the rule be applicable only to Public Land Mobile Service (PLMS) applicants. We propose that the rule apply to all applicants in the PMS, cellular and non-cellular, to the extent that the conditions discussed below are satisfied. We would also apply the rule to major amendments.

[2] Under Section 22.43(a)(1) the date the authorizationis granted is the earliest date for commencementof construction.

[3] Revision and Update of Part 22 of the Public Mobile Radio Service Rules, *Report and Order*, 95 FCC 2d 769, 774 (1983), *affirmed on reconsideration*, 101 FCC 2d 799 (1985), *affirmed on further reconsideration*, 2 FCC Rcd 1798 (1987).

[4] TeleStar Inc., CC Docket No. 85-202, 50 Fed. Reg. 27055 (Com. Car. Bur. 1985).

[5] Under the simple notification proposal, no Form 401 would be filed. The applicant would construct its facility and then merely notify the Commission when construction was complete by filing a Form 489. *See Part 22 Update Order.*

[6] The daisy chain rule, applicable to certain PMS proposals under Section 22.31(c), provides that an application may be cut-off by the filing of unlisted applications which involve conflicts with listed proposals. For a fuller discussion of this rule, see *Bryan Industrial Electronics, Inc.*, 60 Rad. Reg. 2d (P & F) 1713, 1716 (1986).

[7] Question 32 of FCC Form 401 asks applicants whether grant of the application may have a significant environmental effect and if so to attach the environmental assessment statement to the application as an exhibit. *See* Note to 47 C.F.R. Section 1.1305.

[8] *See* 47 C.F.R. Section 1.955.

[9] Line A refers to an imaginary line within the United States approximately paralleling the United States-Canadian Border. Commission coordination with Canadian authorities is generally required for areas north of the line. Line C refers to an imaginary line in Alaska approximately paralleling the border with Canada. See Public Notice, "How to Prepare for Canadian Clearance in Private and Land Mobile Radio Services," Mimeo No. 3938, released May 1, 1984; 47 C.F.R. Section 1.955 (1986).

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Notice of Proposed Rulemaking to delete the requirement in the Public Mobile Service that construction not proceed prior to receiving an authorization

I concur solely with asking the questions raised in this item, but reach no conclusion, tentative or otherwise, about the desirability of the proposed rule changes. I am seriously concerned by the kinds of pressures to which the Commission would be exposed should an applicant begin construction, and the Commission subsequently deny its application or extensively modify it.

Problematic applications generally take more time to process, thus allowing more construction to take place. Although the proposed rule places the risk of unfavorable Commission action on the applicant any applicant who has invested substantial resources in construction will not passively accept an adverse Commission decision denying its application or requiring it to extensively modify its facilities. It is more likely that such an applicant will attempt to persuade the Commission to alter its decision. In such instances, the Commission would necessarily change its focus from the "public interest, convenience and necessity" standard to focus on whether private equities required a different result.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-547

In the Matter of

Amendment of Section 73.202(b), RM-6093
Table of Allotments,
FM Broadcast Stations.
(Kelso, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 31, 1988; Released: October 27, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of P-N-P Broadcasting, Inc. (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 7366 (1987), proposing the allotment of Channel 233A to Kelso, Washington, as that community's first local FM service. In response to the *Notice*, petitioner filed supporting comments reaffirming its intention to apply for the channel. In addition, Armak Broadcasting, Inc., filed supporting comments expressing its intention to apply for the channel.

2. Channel 233A can be allotted to Kelso in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.8 kilometers (4.2 miles) west of the city.[1] The restriction is necessary in order to avoid a short spacing to Station KATS(FM), Channel 233C1, Yakima, Washington.

3. Since Kelso is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been obtained.

4. We believe the public interest would be served by the allotment of Channel 233A to Kelso, Washington, as that community's first FM service. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Kelso, Washington	233A

5. The window period for filing applications will open on **December 13, 1988,** and close on **January 12, 1989.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates are 46-09-27 and 122-59-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-80

In the Matter of

Amendment of Section 73.202(b), RM-5625
Table of Allotments,
FM Broadcast Stations.
(Fort Myers Villas, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: October 27, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Sunshine Broadcasting, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 1083 (1988), proposing the substitution of Channel 291A for Channel 292A at Fort Myers Villas, Florida, and the modification of its construction permit to specify the alternate Class A channel. The petitioner and L.B.C., Inc. (LBC), an applicant for Channel 292A at Cape Coral, Florida, filed comments. The petitioner and Sterling Communications Corp. (Sterling), licensee of Station WSGL(FM), Naples, Florida, filed reply comments and Riverside Baptist Church of Fort Myers, Inc., licensee of Station WSOR(FM), Fort Myers, Florida, and Daytona Group of Florida, Inc., proposed assignee of Station WSOR(FM) (Riverside Baptist), filed joint reply comments.

2. In comments, petitioner states that it no longer supports the allotment of Channel 291A to Fort Myers Villas since it has thus far been unable to receive approval from the Federal Aviation Administration (FAA) for use of its intended transmitter site. However, it now requests that Channel 275A be substituted for consideration. It states that Channel 275A can be used at either an existing site or one which has already been authorized and is under construction. Recognizing that Channel 275A at Fort Myers Villas, as proposed, will result in a short-spacing to Station WSGL, Channel 276A, Naples, Florida, petitioner also requests that the Naples station be modified to operate on Channel 292A. It states that Channel 292A can be used at Station WSGL's present transmitter site in compliance with the Commission's minimum distance separation requirements except for a *de minimus* short-spacing to Station WAFC(FM), Channel 292A, Clewiston, Florida (105.0 kilometers required vs. 104.43 kilometers actual).[1] Because it is the Commission's practice to round off distances to the nearest kilometer, petitioner contends that the short-spacing is only 0.08 kilometers. It submits that a waiver of less than 1.6 kilometers is consistent with Commission precedent, citing *Selectronics Corporation*, 3 FCC Rcd 806 (1988). Should the Commission be unwilling to grant such a waiver, petitioner states that compliance with the Commission's minimum distance separation requirements can be achieved in one of two ways: (1) either Station WSGL at Naples or Station WAFC at Clewiston could move its tower .08 kilometers away so as to avoid the short-spacing, or (2) if the proposed rules in MM Docket 87-121 are adopted, the stations could directionalize their antennas to reduce interference to the level which would exist were they properly separated. Petitioner states that it would reimburse the stations for the cost of antenna relocation, modification or replacement.

3. LBC opposes the reallocation of Channel 292A from Cape Coral to Fort Myers Villas and the substitution of Channel 291A for 292A. In granting the construction permit to the petitioner, the Commission denied LBC's competing application for use of the channel at Cape Coral. However, LBC has sought an appeal of the decision in the United States Court of Appeals for the District of Columbia Circuit, *L.B. C., Inc. v. FCC*, Case No. 88-1072. It states that a major basis of its appeal is the Commission's refusal to add a hearing issue to determine whether Fort Myers Villas is a community to which a station may be licensed, a determination which it believes is not possible. Therefore, it contends that the Commission cannot fairly decide this rule making until the Court of Appeals has acted and LBC's appeal rights have been exhausted. Should Channel 291A be allotted to Fort Myers Villas at this time, LBC argues that the Commission must seek remand of its appeal and permit LBC the opportunity to amend its application to specify the new channel and community. Finally, LBC argues that Sunshine's petition for rule making must be dismissed because it violates the Commission's *ex parte* rules since it was not served with a copy of the rule making request, a request which seeks a change in the Table of Allotments which would disenfranchise LBC while it still has appeal rights.

4. Sterling opposes the modification of its license for Station WSGL to specify Channel 292A at Naples since it would result in a short-spacing to Station WAFC(FM) at Clewiston, as well as any move of its transmitter to a new site. It argues that petitioner's proposal should be dismissed since it violates the Commission's long-standing policy of refusing to entertain proposals that do not comply with the minimum distance separation requirements set forth in Section 73.207 of the Rules. Sterling also states that it is impossible to confirm that Channel 275A at Fort Myers Villas will comply with the minimum distance separation or city grade coverage requirements since the petitioner failed to provide the reference coordinates for the allotment. Further, Sterling states that it is premature at best to consider the use of directionalized antennas by the Naples and Clewiston stations, since no rules have been adopted and the proposal under consideration would not permit their usage for the allotment purposes proposed by the petitioner. Finally, Sterling states that the lateral move of petitioner's station to Channel 275A would deny Naples the expanded service which it seeks to provide if its pending request to upgrade Station WSGL's facilities from its present Channel 276A to Channel 276C2 is granted (RM-6261).

5. Riverside Baptist states that it's license for Station WSOR(FM) at Fort Myers was recently modified to specify operation on Channel 237C1 with a site restriction of 29.4 kilometers west to avoid a short-spacing to the proposed allotment of Channel 291A at Fort Myers Villas. *See* , MM Docket 87-392, 3 FCC Rcd 2671 (1988). However, in light of petitioner's statement that it no longer supports the allotment of Channel 291A, Riverside Baptist

requests that the site restriction for Station WSOR(FM) be modified to specify specific coordinates only 20 kilometers west of Fort Myers at North Latitude 26-34-47 and West Longitude 82-03-51.

6. Petitioner states that LBC's oppositions to the proposed rule making are without merit. LBC's arguments concerning the allotment of Channel 291A at Fort Myers Villas are mooted by the counterproposal to allot Channel 275A there instead, which it states can be used at the site proposed in LBC's application. As to the amendment to the Table of Allotments to specify Fort Myers Villas in lieu of Cape Coral, petitioner submits that this action complies with the Commission's practice of conforming the allotment table to the location of the station authorization when the Table of Allotments is being amended for some other purpose. Should LBC prevail on appeal, petitioner states that the Commission could move the channel back to Cape Coral as easily and routinely as it can now move it to Fort Myers Villas. However, should the Commission agree with LBC, it states that it has no objection to the allotment remaining at Cape Coral at this time. Finally, petitioner contends that the lack of service of the petition on LBC does not violate the Commission's *ex parte* rules. Petitioner states that the rule making proposal does not impact LBC's continuing efforts to obtain a construction permit on Channel 292A at Cape Coral. Further, even if the proposed change might have a potential adverse impact, petitioner states that this action could not occur without LBC's knowledge because the rule making proceeding is made public and issued in the Federal Register.

7. We have carefully reviewed the pleadings before us. We will dismiss petitioner's proposal to substitute Channel 291A for Channel 292A at Fort Myers Villas based on its statement that it no longer intends to pursue use of the channel. In addition, we will deny petitioner's proposal requesting the substitution of Channel 275A for Channel 292A at Fort Myers Villas and the comcomitant substitution of Channel 292A for Channel 276A at Naples. Channel 292A cannot be allotted to Naples for use by Station WSGL without creating a short-spacing between that station and Station WAFC(FM) at Clewiston, Florida. Contrary to petitioner's assertion, it is not Commission policy to waive the minimum distance separation requirements at the allotment stage. Petitioner has provided no contrary precedent. We also reject petitioner's argument that the allotment should not be considered short-spaced since Channel 292A can be allotted to Naples if we measure the distance to Station WAFC(FM) not from Station WSGL's transmitter but from Naples city reference coordinates. A community's reference coordinates are only used where the channel is allotted but unused. *See Canton, Georgia, et al.*, 3 FCC Rcd 737 (1988). As to the use of directionalized antennas to avoid prohibited interference, the rules proposed in MM Docket 87-121 do not contemplate their usage in order to allow the allotment of short-spaced channels. Finally, petitioner states its willingness to reimburse either the Naples or Clewiston stations for the cost of relocating their transmitters so as to avoid the short-spacing. However, the Commission will not force an existing station to relocate its transmitter without its consent absent an unusually strong and compelling public interest reason for doing so. Here, neither Station WSGL at Naples or WAFC(FM) at Clewiston has agreed to the relocation of their transmitter. We find that petitioner's request for the allotment of Channel 275A to Fort Myers Villas so that it may relocate its transmitter to the same side of the Caloosahatchee River as its studio and thus avoid any undesirable delay in reaching the transmitter to correct problems not correctable by remote control does not meet the unusually strong and compelling public interest standard. *See Claremore, Oklahoma*, 3 FCC Rcd 4037, rev. pending.

8. In light of the action taken herein, Riverside Baptist's application for Channel 237C1 at Fort Myers, Florida, need not protect the proposed allotment of Channel 291A at Fort Myers Villas. We need not reach the merits of LBC's opposition in light of the action taken.[2]

9. Accordingly, IT IS ORDERED, That the request of Sunshine Broadcasting, Inc. to substitute Channel 291A for Channel 292A at Fort Myers Villas, Florida, IS DISMISSED and its request to substitute Channel 275A for Channel 292A at Fort Myers Villas and substitute Channel 292A for Channel 276A at Naples, Florida, IS DENIED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner states Channel 292A at Naples would not be short-spaced to any allotment if the distance is measured from the community's reference coordinates. Thus, it argues that the allotment is not "inherently short-spaced but rather only slightly short spaced to the actual WSGL transmitter site."

[2] Although we disagree with LBC's contention that we may not at this time amend the Table of Allotments to reflect the grant of petitioner's application, we will refrain, as a discretionary matter, from making the amendment until LBC's appeal is resolved, since no party will be harmed by the delay.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-512

In the Matter of

Amendment of Section 73.202(b),	RM-6418
Table of Allotments,	RM-6507
FM Broadcast Stations.	
(Bonita Springs and Cape Coral, Florida)	

NOTICE OF PROPOSED RULE MAKING

Adopted: September 30, 1988; Released: October 27, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it two mutually exclusive petitions for rule making. Jacor Communications, Inc. (Jacor) requests the allotment of Channel 283A to Bonita Springs, Florida, as the community's second local FM service and Radio Cape Coral, Inc. (RCC) requests the substitution of Channel 280C1 for Channel 279C2 at Cape Coral, Florida, and the modification of its license for Station WRCC(FM) to specify operation on the higher powered channel. The Commission's rules require a 74 kilometer separation between third adjacent Class A and C1 allotments but Bonita Springs and Cape Coral are located only approximately 50 kilometers apart.

2. Jacor states that it will apply for the channel, if allotted. Channel 283A can be allotted to Bonita Springs in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.9 kilometers (4.3 miles) west to avoid a short-spacing to recently allotted Channel 282C at West Palm Beach, Florida.[1] RCC states that the upgrading of its station to a Class C1 channel could enable it to provide improved service to Cape Coral and the surrounding area, which it claims are growing in population. Channel 280C1 can be allotted to Cape Coral in compliance with the Commission's minimum distance separation requirements with a site restriction of 29.7 kilometers (18.5 miles) northeast to accommodate petitioner's desired transmitter site.[2]

3. We believe the public interest would be served by seeking further comments on the alternative allotment of Channel 283A to Bonita Springs, Florida, as the community's second local FM service or the upgrading of Station WRCC(FM) from Channel 279C2 to Channel 280C1. As requested, we shall propose to modify the license of Station WRCC(FM) to specify operation on Channel 280C1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the channel at Cape Coral or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such other interested parties. In formulating their comments, parties should be guided by the Commission's policy concerning the relative public interest benefits accruing from the allotment of a second local service versus an increase in facilities for an existing station and the type of showing expected by the parties as set forth in *Benton, Arkansas, et al.*, 2 FCC Rcd 1963 (1987), and 3 FCC Rcd 4840 (1988).

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments. Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

City	Channel No. Present	Proposed
	OPTION I	
Bonita Springs, Florida	241C	241C, 283A
	OPTION II	
Cape Coral, Florida	279C2	280C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 19, 1988,** and reply comments on or before **January 3, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mr. Frank Wood
President and Chief Operating Officer
Jacor Communications, Inc.
1300 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202
(Bonita Springs proponent)

Peter A. Rohrbach, Esq.
Marissa G. Repp, Esq.
Hogan & Hartson
555 - 13th Street, N.W.
Washington, D.C. 20004-1109
(Counsel to Jacor)

John T. Scott, III, Esq.
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(Counsel to Radio Cape Coral)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 283A at Bonita Springs are North Latitude 26-20-36 and West Longitude 81-50-50.

[2] The coordinates for Channel 280C1 at Cape Coral are North Latitude 26-47-43 and West Longitude 81-48-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-176

In the Matter of

Amendment of Section 73.202(b), RM-5534
Table of Allotments,
FM Broadcast Stations.
(Five Points, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 6, 1988; Released: October 27, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Five Points Communications, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 3422 (1987), proposing the allotment of Channel 271A to Five Points, Florida, as the community's first local FM service. Comments supporting the allotment were filed by Entertainment Communications, Inc. (Entertainment), successor to the petitioner.

2. As stated in the *Notice*, Channel 271A can be allotted to Five Points in compliance with the Commission's minimum distance separation requirements. However, on June 1, 1987, a timely counterproposal was filed by Casey Broadcasting Co., Inc. in MM Docket 87-77, 2 FCC Rcd 2033 (1987), requesting, among other things, the substitution of Channel 271A for Channel 289A at Watertown, Florida. Co-channel Class A allotments are required to be separated by 105 kilometers but Watertown and Five Points are located only approximately 10 kilometers apart. Thus, the two proposals are mutually exclusive. In an effort to resolve this conflict, the staff has performed a channel search and found that Channel 293A can be allotted to Five Points in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.1 kilometers (2.5 miles) northwest to avoid a short- spacing to Station WEAG-FM, Channel 292A, Starke, Florida.[1] Since the substitution of Channel 293A for consideration herein could avoid delaying the initiation of a first local service to Five Points, we have substituted that channel for consideration herein.

3. We believe the public interest would be served by allotting Channel 293A to Five Points, Florida, since an interest has been expressed in providing the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Five Points, Florida	293A

4. The window period for filing applications will open on **December 13, 1988** and close on **January 12, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 30-13-47 and West Longitude 82-40-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-130

In the Matter of

Amendment of Section 73.202(b), RM-6195
Table of Allotments,
FM Broadcast Stations.
(Old Forge, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: October 27, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Ross Broadcasting Company (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 2000 (1988), proposing the allotment of Channel 231A to Old Forge, New York, as the community's second local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 231A to Old Forge, New York, since it could provide the community with its second local FM service. Channel 231A can be allotted to Old Forge in compliance with the Commission's minimum distance separation requirements without a site restriction.[1] Canadian concurrence has been received since Old Forge is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Old Forge, New York	231A, 259A

4. The window period for filing applications will open on **December 13, 1988,** and close on **January 12, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 43-42-42 and West Longitude 74-58-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-127

In the Matter of

Amendment of Section 73.202(b), RM-5824
Table of Allotments,
FM Broadcast Stations.
(Lebanon, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 6, 1988; Released: October 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of William O. Barry (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 1942 (1988), proposing the allotment of Channel 255A to Lebanon, Tennessee, as that community's second local FM service. In response to the *Notice* petitioner filed supporting comments reaffirming his intention to apply for the channel. Jacor Broadcasting of Nashville, Inc. (Jacor), licensee of Station WYHY-FM, Channel 298C1 at Lebanon, filed comments.[1]

2. Channel 255A can be allotted to Lebanon in compliance with the minimum separation requirements of Section 73.207(b) of the Commission's Rules, with a site restriction. A site restriction of 9.6 kilometers (6.0 miles) north of the city is required in order to avoid a short spacing to Station WAHR(FM), Channel 256C, Huntsville, Alabama.[2]

3. We believe the public interest would be served by the allotment of Channel 255A to Lebanon, Tennessee, as a second FM service. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Lebanon, Tennessee	255A, 298C1

4. The window period for filing applications will open on **December 13, 1988,** and close on **January 12, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Jacor states that it takes no position on the proposal, but advises the Commission that Channel 298 was erroneously specified in the *Notice* as a Class A facility. We have noted the error.

[2] The restricted site coordinates are 36-17-28 and 86-16-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-22

In the Matter of

Amendment of Section 73.202(b), RM-6114
Table of Allotments,
FM Broadcast Stations.
(Lobelville, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 6, 1988; Released: October 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Coleman Broadcasting Company, Inc. (petitioner), licensee of Station WIST(FM), Channel 232A, at Lobelville, Tennessee, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 673 (1988), proposing the substitution of Channel 233C2 for Channel 232A at Lobelville. The *Notice* also proposed the modification of the license of Station WIST(FM) to specify operation on the higher class channel. In response to the *Notice*, petitioner filed supporting comments reaffirming its intention to construct the high powered facility. The proposal provides an opportunity for Lobelville to receive its first wide coverage area FM service.

2. We believe the public interest would benefit by the substitution of Channel 233C2 for Channel 232A at Lobelville, Tennessee, since it would provide a first wide coverage area FM service. Channel 233C2 can be allotted to Lobelville at the petitioner's current transmitter site in accordance with the Commission's minimum distance separation requirements.

3. In accordance with Section 1.420(g) of the Commission's Rules, we shall, as requested, modify the license of Station WIST(FM) to specify operation on Channel 233C2 in lieu of Channel 232A.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Lobelville, Tennessee	233C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WIST(FM), Lobelville, Tennessee, IS MODIFIED, to specify operation on Channel 233C2 in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-187

In the Matter of

Amendment of Section 73.202(b), RM-6215
Table of Allotments,
FM Broadcast Stations.
(Centerville, Utah)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 6, 1988; Released: October 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Radio Property Ventures (petitioner), licensee of Station KCGL(FM), Channel 289C2 at Centerville, Utah, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 2615 (1988), proposing the substitution of Channel 289C1 for Channel 289C2 at Centerville, and modification of the station's license accordingly. Petitioner filed supporting comments restating its intention to construct the high class facility.

2. We believe the public interest would be served by the substitution of Channel 289C1 for Channel 289C2 at Centerville, Utah, providing that community with expanded FM service. Channel 289C1 can be allotted to Centerville in accordance with the Commission's minimum distance separation requirements at the station's current transmitter site.[1]

3. As requested, we are modifying the license of Station KCGL(FM) to specify operation on Channel 289C1 in lieu of Channel 289C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Centerville, Utah	289C1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KCGL(FM), Centerville, Utah, IS MODIFIED, to specify operation on Channel 289C1 in lieu of Channel 289C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates are 40-48-29 and 111-53-21. It should be noted that the 14.7 kilometers site restriction proposed in the *Notice* is no longer necessary.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-620

In the Matter of

Amendment of Section 73.202(b), RM-6098
Table of Allotments,
FM Broadcast Stations.
(Deer Park, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 6, 1988; Released: October 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 378 (1988), issued at the request of Barbara L. Kazmark (petitioner), licensee of Station KAZZ(FM), Channel 296A, Deer Park, Washington, proposing the substitution of Class C2 Channel 296 for Channel 296A at Deer Park. In addition, the *Notice* proposed the modification of the license of Station KAZZ(FM) to specify operation on the higher class co-channel. Petitioner submitted supporting comments reaffirming an interest in pursuing the upgrade.

2. Channel 296C2 can be allotted to Deer Park consistent with the Commission's minimum distance separation requirements with a site restriction of 25.8 kilometers (16.0 miles) northeast of the community.[1] The restriction is necessary to avoid short spacings to Station KMOK(FM), Channel 295C, Lewiston, Idaho and a vacant Canadian allotment at Grand Fork, British Columbia, Channel 297A. The allotment will require the relocation of the petitioner's current transmitter site. Petitioner has indicated a willingness to relocate.

3. Concurrence has been obtained from the Canadian government, since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border. We obtained approval for Channel 296C2 to operate as a specially negotiated short-spaced allotment due to a short spacing to vacant Channel 295B at Nelson, British Columbia, Canada.

4. We believe the public interest would be served by the substitution of Channel 296C2 for Channel 296A at Deer Park, Washington, providing that community with a first wide coverage area FM service. As requested, we are herein modifying the license of Station KAZZ(FM) to specify operation on Channel 296C2 in accordance with Section 1.420(g) of the Commission's Rules.

5. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Deer Park, Washington	296C2

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KAZZ(FM), Deer Park, Washington, IS MODIFIED, to specify operation on Channel 296C2 in lieu of Channel 296A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates are 48-08-35 and 117-15-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-564

In the Matter of

Amendment of Section 73.202(b), RM-5846
Table of Allotments,
FM Broadcast Stations.
(Augusta, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 29, 1988; Released: October 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 2 FCC Rcd 7435 (1987), proposing the substitution of Channel 249C2 for Channel 249A at Augusta, Arkansas, and modification of the license of Prescott-McGuire Broadcasting, Inc. (Prescott) for FM Station KABK-FM, Channel 249A, to specify operation on the higher class channel. At the time this proposal was filed, Dixie Broadcasting, Inc. was the licensee of Station KABK-FM. An assignment of the license to Prescott-McGuire Broadcasting, Inc. (BALH-880329HY) was subsequently granted on May 20, 1988. The former licensee filed supporting comments. Additionally, Prescott submitted supplemental comments.[1]

2. As stated in the *Notice*, Channel 249C2 can be allotted to Augusta in conformity with the minimum distance separation requirements set forth in Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 11.2 kilometers (7.0 miles) south[2] of the community to avoid short-spacing to a rule making proposal in MM Docket No. 88-146 seeking to modify Station KWLN(FM) (Channel 251C1), Osceola, Arkansas, to Channel 251C.

3. The Commission believes the public interest would be served by substituting Channel 249C2 for Channel 249A at Augusta, Arkansas, since it could provide a first wide coverage area FM service to the community. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station KABK-FM to specify operation on Channel 249C2 in lieu of Channel 249A at Augusta, Arkansas.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to:

City	Channel No.
Augusta, Arkansas	249C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Prescott-McGuire Broadcasting, Inc. for Station KABK-FM, IS MODIFIED, effective **December 12, 1988,** to specify operation on Channel 249C2 in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] These comments, which advise us of the recent assignment of license of Station KABK-FM from Dixie Broadcasting, Inc. to Prescott were not accompanied by a motion to accept. However, since the comments simply reaffirm Prescott's continuing interest in pursuing the modification proposal initiated by Dixie Broadcasting, Inc., no prejudice will ensue from their acceptance.

[2] Reference coordinates at the restricted site are 35-11-00 and 91-20-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-9

In re

Allowable Costs for
Noncommercial FM Licensees
To Charge Radio Reading
Services

POLICY STATEMENT

Adopted: October 13, 1988; Released: October 28, 1988

By the Commission:

I. INTRODUCTION

1. This *Policy Statement* is intended to clarify the kinds of costs that a noncommercial radio station may properly charge to the operators of a radio reading service to lease the station's subcarrier capacity pursuant to Section 73.593 of our rules.[1] The *Policy Statement* is the outgrowth of the *Notice of Inquiry* [2] issued last year in the above-captioned proceeding which solicited public comment on the issue of permissible charges to radio reading services. In that *Notice*, we specifically asked commenters to provide us with itemized statements of the charges being assessed by stations for reading service operations. We also asked commenters to identify those types of costs that would not be incurred by the stations but for the provision of the reading services.

2. In response to the *Notice*, thirteen parties filed comments; eight parties filed reply comments; and two parties filed supplemental comments. [3] Commenters included the Association of Radio Reading Services (ARRS), which represents over 70 radio reading services, approximately three-quarters of the services in operation, the National Association of Broadcasters (NAB), the Corporation for Public Broadcasting (CPB) and National Public Radio (NPR). Additionally, a number of universities which hold public FM licenses filed joint comments.[4] The comments clearly indicate that there is substantial confusion as to what costs can legitimately be charged by a public radio station to the operators of a radio reading service. Having carefully reviewed and analyzed the comments, we are issuing this *Policy Statement* in an attempt to eliminate any existing confusion on the matter of the appropriateness of certain charges by noncommercial FM stations to radio reading services.

II. BACKGROUND

A. Radio Reading Services

3. A radio reading service is an aural service provided primarily for the blind and visually impaired through the use of an FM licensee's subcarrier capacity. The FM station's subcarrier, which is used to broadcast the reading service, is an *inherent* part of the composite FM baseband frequency.[5] A specially equipped receiver is required by those using the reading service. There are approximately 112 of these services operating in 40 states Reading services can provide an alternative form of access to printed materials like newspapers, magazines, and books for those with visual or other physical handicaps that will not permit the holding or reading of printed materials.

B. The Previous Rule

4. Historically, Section 73.593 restricted public radio stations' use of their subcarrier capacity to those services that were consistent with the noncommercial educational purposes of such stations.[6] This rule specifically identified what types of programs could be offered on a public radio station's subcarrier. One of the permitted uses was for programs intended to serve the special needs and interests of the handicapped. If a station used its subcarrier for any noncommercial educational purpose, it was permitted to charge an amount which could not exceed the sum of the approximate cost of conducting the subcarrier operation (including purchase or lease of equipment, course material, personnel services, etc.), and the general overhead and operational costs attributable to such operations.[7] Thus, under the version of Section 73.593 in force prior to 1983, the Commission was careful to ensure that public radio stations could be fully reimbursed for the cost incurred as a result of the use of their subcarriers. This meant that public radio stations could recover both their incremental costs[8] and those portions of their overhead costs[9] resulting from the noncommercial services they were allowed to offer.

C. The Public Broadcasting Amendments Act of 1981

5. In 1981, Congress passed the Public Broadcasting Amendments Act which amended the Communications Act to give public broadcasters, *inter alia*, the authority to use their facilities for remunerative purposes so long as such profit making activities did not interfere with the station's public telecommunications responsibilities.[10] Anticipating that federal government spending for public broadcasting would be reduced, Congress wanted to ensure that public stations would not be hampered in their independent efforts to generate funds for their operations from nongovernmental sources.[11]

D. Report and Order in BC Docket No. 82-1

6. In response to the Public Broadcasting Amendments Act, we reexamined the restrictions imposed by Section 73.593 of our rules. In the *Report and Order* in BC Docket No. 82-1,[12] we concluded that the restrictions limiting public FM stations to noncommercial uses of their subcarriers were inconsistent with the spirit of the legislation. Consequently, we amended Section 73.593 to authorize noncommercial FM licensees to use their subcarriers for the same range of remunerative activities as commercial radio stations.[13] We emphasized in the *Report and Order* that public stations are not required to use their subcarrier capacity. However, we made it clear that if a public station chooses to use its subcarrier for a commercial purpose, it is obligated to accommodate a radio reading service on its other subcarrier or ensure the availability of other subcarrier capacity.[14] We also explained that public stations would not be required "to bear the fixed or operating costs" of the reading services,

but would be expected to provide such services on a "not-for-profit basis."[15] In so doing, we attempted to balance the needs of the stations to receive reimbursement for their services with the public benefit of radio reading services for the handicapped.

7. A year after we issued our *Report and Order*, it became apparent that there was still some confusion over what charges public stations were allowed to recover from radio reading services under our amended rule. Mr. John C. DeWitt wrote a letter on behalf of The American Foundation for the Blind, Inc. asking the Commission to clarify, among other things, whether the not-for-profit charges that public stations passed on to reading services had to be based only on demonstrable incremental costs or whether they could also be based on percentages or proportional bases of the station's operating budget. In response, the Mass Media Bureau, in a letter dated December 3, 1984, stated that a "station should not exceed the incremental costs of conducting the radio reading service" but that "the applicable portion of the station's overhead that relates to providing the radio reading service is included in the incremental costs."[16] Even after the Bureau issued this letter, there was still confusion among noncommercial radio stations and reading service organizations as to allowable and nonallowable costs.

E. Petition for Rule Making

8. On May 20, 1986, the Association of Radio Reading Services, Inc. (ARRS) filed a *Petition for Rule Making*, requesting that the Commission impose a mandatory access requirement on noncommercial educational FM licensees to lease their subcarrier capacity to radio reading services and to require that such stations charge only nondiscriminatory, incremental cost-justified rates.[17] ARRS also urged the Commission to issue guidelines that would clarify the term "incremental costs" as initially used in the Bureau letter. In its petition, ARRS stressed that neither the *Report and Order*, nor the rule itself, specified what constituted profit or what costs may be assessed by public stations in determining rates for reading services.

9. Several commenters filed in response to ARRS' petition. Only one commenter strongly favored the imposition of a mandatory access requirement. Other commenters pointed out that ARRS' proposal did not take into account other noncommercial public uses of a station's subcarrier and that mandatory access by reading services would raise serious first amendment issues. Evidence was also presented by commenters which contested ARRS' assertions that our rule amendment had adversely affected the growth of reading services. The comments also revealed a great disparity in the amount that public stations charge radio reading services.

F. Memorandum Opinion and Order and Notice of Inquiry

10. On the basis of the record developed, we issued, on January 16, 1987, a combination *Memorandum Opinion and Order* and *Notice of Inquiry* in the proceeding.[18] In the *MO & O* portion of the item, we rejected a proposal to amend Section 73.593 of our rules to *require* that noncommercial FM radio licensees accommodate radio reading services. The record, however, was not adequate to allow us to respond to ARRS' request for a clearer definition of incremental costs, and we determined that it would be inappropriate to attempt to resolve specific cost issues without a further record. In particular, we recognized the need to clarify what portion of general overhead costs can be appropriately allocated to a radio reading service. Accordingly, we issued the companion *Notice of Inquiry* now before us so that we could determine the actual cost of operating a radio reading service and proffer guidance concerning which costs could be passed on to the reading services. The *Notice* asked commenters to explain the apparent cost disparities in charges to radio reading services and to indicate whether our imposition of a particular method of calculating costs would be beneficial.

G. Comments

11. The commenters responding to the *Notice* divided fairly evenly into two groups--the radio reading services and the noncommercial FM stations. Generally, the radio reading services challenged the legitimacy of some or all of the costs charged by the stations; some services provided detailed information on costs or attached itemized bills to substantiate their allegations. On the other hand, the public stations defended their methods of calculating costs and asserted that the rates they charge reading services do not generate profits. Generally, public stations urged the Commission to rely on their discretion in determining costs, asserting that they are in the best position to determine the actual cost to their stations of operating a reading service.

12. *Reasons Given for Cost Disparities.* In our *Notice*, we requested an explanation for the wide disparity in the costs charged to reading services by public radio stations. The comments indicated that the disparities in costs charged are the result of a number of factors. First, noncommercial radio stations may use different methods to determine what to charge a radio reading service. Stations can charge flat, monthly, or hourly rates and the stations often differ in the manner in which these rates are set, e.g., some stations merely discount the rate charged by commercial stations for use of their subcarrier. Second, some stations charge reading services not only for the use of the subcarrier capacity, but also for a variety of other costs including transmission costs, personnel, maintenance and rental of space for housing subcarrier equipment. Third, some disparities can be traced to the fact that the equipment and labor costs associated with the implementation of the reading service vary from station to station.[19] For example, the need for and the cost of capital equipment to activate the subcarrier can vary widely depending on the state of the existing technical facilities at a given public radio station. Fourth, cost differentials can result from stations charging less than the maximum allowable costs under our rules. Finally, stations differ in whether, and to what extent, they charge radio reading services separately for the numerous types of optional or ancillary services[20] that a station may offer to a reading service, e.g., production personnel, studio time, or customer support.

13. *Incremental Costs.* A review of the comments reveals that most of the costs which can be potentially passed on to radio reading services fall into the category of either incremental costs or overhead costs. Incremental costs are typically thought to mean the costs that a noncommercial station would not incur *but for* the provision of subcarrier capacity to a reading service. For a definition and discussion of overhead costs, *see* ¶ 14. Most commenters have agreed that it is appropriate to pass on these incremental costs to reading services. However, there is some disagreement as to exactly which costs are "incremental."[21]

14. The reading services who commented offered varying descriptions of these costs which perhaps reflect the different types of services furnished by each station. Most reading services agree, however, that the following would be included in the category of incremental costs:

1) The cost of electrical power consumed by the subcarrier equipment used by that reading service.[22]

2) A prorated portion of maintenance and repair costs of subcarrier equipment.[23]

3) A prorated portion of purchase and installation costs of subcarrier equipment, if the station does not already own this equipment.[24]

In addition, there was general agreement among most commenting reading services that the following should *not* be included in a definition of "incremental costs":

1) The cost of transmitting the subcarrier's signal from the station's studio to its transmitter.[25]

2) "Interference prevention" costs.[26]

3) Lost opportunity costs resulting from accommodating a reading service instead of a fully remunerative lessee.

4) Check processing or similar fees, unless these same fees have been imposed on the radio stations by their banks.[27]

15. *Overhead Costs.* The stations differ with the reading services on whether they are allowable,[28] with most stations preferring a definition which would allow a proportional charge for such costs. More specifically, they assert that these overhead costs should be chargeable to the reading service only to the extent that the reading service "draws on or shares existing personnel, services or facilities of the station."[29]

16. As indicated above, there was substantial disagreement among the commenters regarding the treatment of overhead costs. Overhead costs are generally understood by the commenters to be the basic costs of operating the public station, which would include salaries, rent, maintenance, etc. In responding to our request for information about actual charges, most of the commenters focused on this issue of the allocation of overhead costs between the stations and reading services. Several reading services contest the legitimacy of charging overhead costs. For example, Written Communications Radio Service (WCRS), an Ohio radio reading service, disputed the validity of numerous overhead costs charged to it by WKSU, Kent State University's noncommercial FM station.[30] Specifically, WCRS contested the allocation by WKSU of a percentage of the salary of each station employee to their reading service,[31] a20.00 a month charge to process their monthly reimbursement checks for the telephone bill, 2% of the station's annual electric bill, an annual100 fee for renting a rack that holds the subcarrier monitoring equipment and an annual1,300.00 legal fee.[32]

17. WKSU claimed that complaints of WCRS stemmed from its basic disagreement with allowing *any* overhead costs to be charged to its operations. WKSU and the Joint Commenters insist that overhead costs are properly chargeable to the reading services, but only to the extent that the reading services draw on or share a station's existing personnel, services or facilities.[33]

18. The controversy concerning the recovery of overhead costs is specifically illustrated in the area of transmission costs. Several reading services object to being charged for transmission of the subcarrier signal between a public station's studio and its transmitter[s].[34] First, they argue that the subcarrier signal is an inherent part of the FM signal once the subcarrier has been activated. Consequently, the subcarrier signal is transmitted simultaneously with the station's main signal. The reading services stress that the signal delivery system is an integral part of the broadcasting system and is in operation regardless of whether or not a radio reading service uses it. The West Virginia Broadcasting Authority (WVEBA), on the other hand, argues that this proceeding should be strictly confined to the costs that can be recovered for the use of the subcarrier and therefore contends that the question of the charges that it passes on to the West Virginia Radio Reading Service (WVRRS) for the use of its microwave transmission system are outside the scope of the *Notice*.[35] Nevertheless, WVEBA defends its charges as proper.[36]

19. In addition to questioning the specific types of overhead charges being passed on to them, several of the reading services challenged the legitimacy of charging for these overhead costs on an hourly basis. They contend that hourly charges were developed on the basis of fixed yearly costs for electricity or dedicated telephone lines. These costs are generally computed on the assumption of continuous twenty-four hour a day service or availability. Those reading services that operated for a limited number of hours during the day stated that, when they wanted to increase their hours of operation, they were required to pay a predetermined hourly rate for each additional hour. Consequently, they assert that they are being charged twice for service costs which do not vary with the number of hours that the reading service is operating.

20. *Suggestions for Clarifying Recoverable Costs.* The commenters were unanimous in requesting that the Commission provide some form of guidance to the parties concerning legitimately allowable charges under Section 73.593. The commenters made a variety of suggestions aimed at clarifying legitimately recoverable charges. The Corporation for Public Broadcasting (CPB) and the majority of reading services urged the Commission to delineate recoverable cost categories. They believe that such illustrative lists will provide a simple reference point for rejecting or accepting certain types of charges. Additionally, some of the reading services recommended that the Commission develop a list of costs that can not be charged to the radio reading services. A number of reading services suggested that the Commission require itemization of incremental costs in order to document the exact nature of the additional costs that are attributed to reading service operations. Other commenters suggested that stations should bill reading services separately for transmission related charges, ancillary services and repairs. Many reading services suggested abolishing hourly charging as a method for calculating appropriate charges in order to preclude stations from passing on fixed yearly operating costs more than once. The reading services offered these suggestions to encourage precision in ascertaining the actual costs that are directly attributable to reading services' operations.

21. The stations argue that such precision, particularly with regard to overhead costs, is impossible. Furthermore, the stations stress that by insisting on such precision, especially in calculating a portion of overhead costs, the reading services are really trying to avoid paying their fair share of the basic operating costs. The stations urge the Commission to defer to their discretion and their good faith estimates of costs that are allowable within the Commission's not-for-profit standard. They assert that they are in the best position to make the determination of the proper charges to the lessees of their subcarriers. Furthermore, they contend that we should intervene only where there is clear evidence of abuse of our standards.

22. Several stations argue that the Commission should also defer to their discretion as to how they charge – *i.e.*, whether their charges are based on hourly, monthly or flat rates. In contrast, other stations, as well as the NAB and CPB, advocate pricing or accounting guidelines to address the issue of the method used to compute charges.[37] They believe that such guidelines will provide adequate parameters within which they can make their pricing determinations, yet still provide sufficient flexibility to negotiate contracts which would be appropriate in different circumstances. These same parties oppose imposing a universally applicable formula for calculating costs because they believe that such a solution would be too rigid to encompass the myriad of unique arrangements between stations and the reading services.

III. DISCUSSION

23. We are persuaded from the record that there is confusion regarding allowable and nonallowable charges for providing radio reading services under our not-for-profit standard. We are issuing this *Policy Statement* to provide clarification of allowable costs under the not-for-profit standard inherent in Section 73.593. In the following discussion, first, we will define incremental costs. Second, we will address the difficult issue of allocating general overhead costs between reading services and public stations. Third, we will provide examples of nonallowable costs under Section 73.593.[38]

24. *Incremental Costs*. If a station decides to charge a radio reading service for use of its subcarrier capacity, the station may recover the actual incremental costs of providing that service. By "incremental costs" (in the context of this proceeding), we mean those additional out-of-pocket costs that are caused by the operation of the reading service. Clear examples of such costs are the capital cost of the equipment needed for and used in the provision of the subcarrier signal to the radio reading service and any modification to a microwave system or a station's transmitter necessitated in order to so deliver the subcarrier signal. Other examples include the additional cost of the power necessary to operate the subcarrier and associated equipment, and any specific repairs related to subcarrier equipment or operations. Of course, if the station uses a single subcarrier during certain hours to provide radio reading services and during other hours to provide some other, profit-making service, then the radio reading service should be charged a fraction of the total subcarrier equipment and electricity cost and other related costs. The costs of ancillary services or products that the station may choose to provide to the reading services may also be treated as incremental costs and are also recoverable.[39]

25. A similar incremental cost standard was embodied in the previous version of the rule. In using that standard in the original rule, we contemplated that a public station should be compensated for any out-of-pocket expenses incurred in allowing one of the permitted uses on its subcarrier.[40] In other words, the station should be no better or worse off than it was before leasing the subcarrier. When we carved out a priority for reading services in Section 73.593, we intended that reading services continue to operate under this same not-for-profit standard.[41]

26. *Overhead Costs*. We recognize that the question of apportioning general overhead costs provides the most troublesome area for the parties to resolve. It should be clear from our definition of incremental costs that any costs which are directly attributable to the reading service are recoverable.[42] We do not wish to disallow reimbursement for such costs, since that might create the incentive for public radio stations to decline to provide reading services altogether, if to do so would cause them to incur losses. Refusal to offer reading services would force them to refrain from offering their subcarriers to paying subscribers as well. Overhead costs, such as salaries, rent and maintenance that are incurred by the station in the absence of the radio reading service and that are not increased when the station provides a subcarrier to the radio reading service, would not be allowed. As previously noted, some reading services concede that partial reimbursement for fixed overhead or salary costs should be allowed. Moreover, most stations prefer a definition which would allow a proportional charge for such costs only to the extent that the reading service "draws on or shares existing personnel, services or facilities of the station." Paragraph 13, *supra*. With these views in mind, we will permit stations to recover only those fixed overhead costs which are attributable to the provision of a reading service and can be so justified by the radio station.[43] To more closely determine such attributable costs, we suggest that both parties attempt to foresee the nature of those fixed overhead costs that might appropriately be charged to radio reading services and that they explore the possibility of including itemized charges or an explicit provision for these costs in their contracts. Another option would be to negotiate a completely separate billing.

27. *Nonallowable Costs*. Several of the reading services and ARRS urged us to designate certain costs as nonallowable. For example, WCRS suggests that fees for check processing, rental of space for the subcarrier equipment, general salaries, legal fees and transmission links like those between the station and transmitter charged by Kent State be included in this category. We consider all but the last item to be general overhead costs and therefore the parties should be guided by our previous discussion of this area. We note further that it would be improper for the station to charge any sort of fees such as check processing or similar fees to the radio reading service unless such fees are routinely charged to the station by the bank which processes those checks or unless those fees can be justified as related to the incremental cost of processing payments made by the radio reading service.

28. With regard to the costs for the transmission links between the station and the transmitter, we believe that such costs generally cannot be passed on to the reading service unless there is evidence that the reading service creates an incremental cost burden on such links. Technically, a subcarrier is an inherent part of the FM bandwidth used by the public radio station. Once the reading

service has paid for the capital equipment necessary to activate the subcarrier -- including additional channels for microwave systems if necessary -- the actual transmission of the subcarrier signal, in most cases, would not cost the station any more than it pays to transmit its own signal. However, to the extent that the existence of the subcarrier decreases the quality of the station's signal or increases the possibility of interference to the transmission links, then any costs which the station incurs to correct those problems are properly chargeable to the radio reading service.

29. Another type of cost that is generally not recoverable is lost revenues from an actual or potential alternative lessee. Under normal circumstances, a broadcasting station, whether commercial or noncommercial, can view the opportunity cost of using a subcarrier for any particular purpose as the revenue it has given up by not using the subcarrier for its most profitable alternative use. This principle is not applicable here, however, where the public radio stations are restricted by our rules in the use of their subcarrier capacity. In the *Report and Order* adopting the current version of Section 73.593, we determined that any station that wishes to lease its subcarrier capacity must first accommodate interested radio reading services itself or ensure the availability of other subcarrier capacity.[44] Thus, under our rule, there is no allowable alternative usage for the subcarrier capacity if it is needed to provide a reading service to its community. Given this policy, it is not appropriate for the station to charge the radio reading service the value of the subcarrier in a profitable alternative usage. If the public station is leasing another subcarrier for remunerative purposes, it will not be permitted to charge the reading service the difference between its remunerative alternative and the reading service's incremental costs. Both the Communications Act and our rules require these stations to fulfill their public telecommunications responsibilities before profiting from the use of their facilities.

30. We have provided the general guidelines discussed above as a framework within which the parties can negotiate private contracts to govern their particular arrangements for services. Such contracts give both parties the flexibility to account for variations in equipment, facilities, services and products involved in providing reading services. We urge the parties to enter into clear contracts outlining their respective cost obligations within the guidelines provided here. These contracts should provide the opportunity to the parties to specify the types of costs that will be recovered by stations from reading services and the method by which these costs are to be estimated.

31. We believe that providing general guidelines as to allowable and nonallowable costs is preferable to establishing cost computation formulas or more rigid cost categories as requested by numerous commenters. First, it is unlikely that the Commission could develop formulas or precise cost categories that would contemplate the wide variety of equipment, facilities, products and services involved in providing reading services. Thus, any fixed formulas or cost categories developed by the Commission would likely be incomplete or overbroad. Second, stations and reading services are in the best position to determine the incremental costs of the reading services in each particular situation. Imposition of rigid formulas or cost categories would remove this needed discretion and force the parties to comply with rules that may be arbitrary or inapplicable to their arrangements.

32. We also believe that general guidelines discussed above are more appropriate than the specific accounting or pricing guidelines recommended by some commenters for a number of reasons. To account for the variability in a station's equipment and facilities, as well as variability in their accounting methods, we would have to devise a range of accounting guidelines from which the stations could choose. For example, with regard to the capital cost of the subcarrier equipment, we would have to devise accounting guidelines that take into account the alternative methods of depreciating capital and amortizing loans. We believe that the resources that would be required to develop said guidelines would be unwarranted. First, it is not clear that the scope of the problem requires such an expenditure of resources. The CPB study[45] suggests that most stations and radio reading services are not disputing allowable costs. For those that are, we believe that the general guidance offered in this *Policy Statement* will provide the parties with a sufficient basis on which to resolve any disagreements. Finally, we are reluctant to promulgate detailed accounting regulations because we believe it is an unnecessary intrusion into the parties' discretion.

33. Authority for this action is contained in Sections 4(i), 303, 307(b) of the Communications Act of 1934 as amended. In addition, the proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

34. Accordingly, IT IS ORDERED, THAT this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX 1

Comments

Alaska Information Radio Reading and Education Services
Association of Radio Reading Services
Bible Broadcasting Network, Inc.
Brown Broadcasting Service, Inc.
Corporation for Public Broadcasting
Joint Comments (Arizona Board of Regents, Board of Visitors of James Madison University, Kent State University, Ohio State University, WSKG Telecommunications Council)
KJZZ/Sun Sounds Station
National Public Radio
Ohio Radio Reading Service
West Virginia Educational Broadcasting

Authority
Written Communications Radio Service
West Virginia Radio Reading Service
(West Virginia Library Commission)
Youngstown Radio Reading Service

Reply Comments
Association of Radio Reading Services
Corporation for Public Broadcasting
WKSU-Kent State University
National Association of Broadcasters
National Public Radio
Summit County Society for the Blind
West Virginia Educational Broadcasting Authority
West Virginia Radio Reading Service
(West Virginia Library Commission)
[filed two replies]

Supplemental Comments
Corporation for Public Broadcasting
Written Communications Radio Service

FOOTNOTES

[1] Section 73.593 reads as follows:

> The licensee of a noncommercial educational FM station is not required to use its subcarrier capacity, but if it chooses to do so, it is governed by Sections 73.293 through 73.295 of the Commission's Rules regarding the types of permissible subcarrier uses and the manner in which subcarrier operations shall be conducted; Provided, however, that remunerative use of a station's subcarrier capacity shall not be detrimental to the provision of existing or potential radio reading services for the blind or otherwise inconsistent with its public broadcasting responsibilities.

[2] *Amendment of Part 73, Subpart C of the Commission's Rules to Require Licensees of Noncommercial FM Stations to Accommodate Requests by Radio Reading Services to Utilize Their Subcarrier Capacity on an Incremental Cost Justified Basis*, 2 FCC Rcd. 680 (1987)(*Memorandum Opinion and Order and Notice of Inquiry* in MM Docket 87-9) [hereinafter either *MO & O* or *Notice*].

[3] A list of the parties filing comments may be found in Appendix 1.

[4] The Arizona Board of Regents, James Madison University, Kent State University, Ohio State University and WSKG Telecommunications Council filed joint comments [hereinafter Joint Commenters].

[5] Generally, FM licensees have two subcarrier channels available for use although it is technically possible to have more. Commission rules permit an FM licensee to authorize independent groups to use the station's subcarrier capacity. Section 73.295 of the rules outlines the conditions for subcarrier use and provides an illustrative list of permitted services which include specialized foreign language programming, paging and calling, telemetry, and traffic control signal switching. In order to use a station's subcarrier frequency, certain special equipment is necessary, i.e., a subcarrier generator, an audio compressor/limiter, a dedicated broadcast line, and some type of diagnostic equipment which monitors the baseband signal. During monophonic program transmissions, multiplex subcarriers and their significant sidebands must be within the 20 kHz to 99 kHz range; during stereophonic transmissions, their range is restricted to between 53 kHz and 99 kHz.

[6] 47 C.F.R. § 73.593 (a)(1)(iii) (1982).

[7] *Id.*

[8] As we explain further below in paragraph 13, by incremental costs we mean those additional costs caused by the provision of the radio reading service's use of the subcarrier.

[9] By overhead costs we mean the basic costs of operating the station, such as salaries, rent and maintenance that would not be changed by the existence or nonexistence of the radio reading service.

[10] Omnibus Budget Reconciliation Act of 1981, Pub. Law No. 97-35, § 1231, 95 Stat. 357, 731 (codified at 47 U.S.C. § 399B (1982)).

[11] 127 Cong. Rec. S 9037-38 (1981) (colloquy between Sen. Schmitt and Sen. Packwood); *see also* S. REP. No. 98, 97th Cong., 1st Session (1981).

[12] *See Amendment of Sections 73. 593 of the Commission's Rules*, 48 Fed. Reg. 26608 (June 9, 1983), 54 RR 2d 25, 35 [hereinafter *Report and Order*].

[13] *Id.* at 26614.

[14] *Id.* We provided some general guidelines for stations in accommodating radio reading services but left the implementation to each station's discretion. *Id.* n. 31. In addition, "ensuring the availability of other subcarrier capacity" could mean that the the non-commercial radio station has assured the availability of another radio station's subcarrier for use by radio reading services.

[15] *Id.* n. 32.

[16] Letter from Chief, Mass Media Bureau to John C. DeWitt (December 3, 1984) [hereinafter Bureau letter].

[17] The petition was placed on public notice on July 14, 1986 (Report No. 1605).

[18] *See* n. 2, *supra*.

[19] ARRS and other reading services assert that the actual cost variations, resulting from differing equipment and operating costs in different markets, do not correlate with the variations in the fees being charged. Reply Comments of ARRS at 3.

[20] By "ancillary services" we mean services provided by the station that are in addition to the minimum services necessary to make a subcarrier available to the radio reading service. Examples of ancillary services include advertising assistance, the transmission link from the reading service's separate studio to the station's facilities, and use of studio space. Some stations provide ancillary services and some do not. Of those stations that do provide ancillary services, some explicitly charge for those services and some do not. In the main, the commenters agree that because these services are optional, their procurement should be the subject of a separate contract between the reading service and the noncommercial station. *See, e.g.*, Reply Comments of ARRS at 7 n.5.

[21] Joint Comments at 3; Reply Comments of West Virginia Educational Broadcasting Authority at 1; Reply Comments of Kent State University at 3; Comments of National Public Radio at 2.

[22] Reply Comments of ARRS at 6; WCRS Complaint Letter at 1, see infra, note 30; Comments of Youngstown Radio Reading Service at 2 (asserting that "[i]t is estimated that 75 watts of power is all that is required to completely operate the SCA programming. On an average figure of 11c per kilowatt hour this totals to an annual electrical charge of approximately75.00").

[23] Joint Commenters at 6; Reply Comments of ARRS at 6.

[24] Reply Comments of ARRS at 6.

[25] Reply Comments of ARRS at 7.

[26] NPR, in their Comments (at 5) claims that spectrum analyzers costing 6,000 to15,000 and specially trained personnel are needed to control subcarrier channel interference with the main channel. However, ARRS, in its Reply Comments (at 7), disputed this claim. They assert that:

> [s]ubcarrier frequencies do not, in fact, *cause* interference with main channel signals. A station maintained in accordance with good engineering practices will not experience interference to either the main or subcarrier signals. Thus, costs related to monitoring or repairing interference would be incurred in any event, and are not the fault of the SCA user.

[27] Reply Comment of ARRS at 9.

[28] ARRS and other reading services would have the FCC prohibit stations from charging for any overhead costs not occasioned *exclusively* by the reading service's use of their subcarrier.

[29] Joint Commenters at 6.

[30] WCRS filed a complaint against WKSU-FM at Kent State University concerning these charges. This complaint, which was filed on April 10, 1985, remained pending, awaiting the resolution of the cost issues in this proceeding, until September 6, 1988, when the Commission received a letter from WCRS stating its intention to withdraw its complaint due to the resolution of differences between itself and WKSU-FM. In that letter, WCRS also withdrew its comments of June 16, 1987, and it's council's reply dated, July 8, 1985.

[31] Included were percentages of the salaries of the Director of Engineering (5% or1,276.00), the Operations Coordinator (3% or662.00), the Business Manager (1% or197.00), the Secretary (.5% or86.00), and the Board Operator (33 1/3% or6,552.00).

[32] Comments of Written Communications Reading Service (WCRS) at 4-19.

[33] Reply Comments of WKSU-Kent State at 4.

[34] *See* Comments of the West Virginia Radio Reading Service at 7.

[35] Reply Comments of WVEBA at 3-4.

[36] WVEBA charges WVRRS the same price that it charges other non-profit groups for the use of its facilities. These charges are based on fixed charges that it established for use of its microwave system. WVEBA argues that WVRRS is not obliged to use its microwave system but can use telephone company lines to deliver the reading service's subcarrier signal.

[37] Precise guidelines were suggested in the following areas: the actual cost bases for pricing, the frequency with which such bases should be recalculated, allowable methods for allocating costs of jointly and concurrently operated facilities and allowable methods for calculating cost overhead rates. *See* Comments of CPB at 7-8.

[38] A CPB survey conducted in connection with this proceeding demonstrates that many stations offer their subcarriers to independent groups at no charge. Of the 295 public radio stations that responded to CPB's survey, 83 reported that they use one or more subcarrier channels for reading services. Of these 83 stations, 32 operate their own reading services, and 21 offer their facilities to independent groups at no charge. CPB Comments at 4-5. Although we are providing cost guidelines in this *Policy Statement*, we wish to emphasize that a public station is not required to charge a reading service for the use of its subcarrier or any ancillary services it provides.

[39] Ancillary services are not services that must be provided by the station as a consequence of providing the subcarrier. Rather, ancillary services are additional services that the station and the radio reading service agree will be provided, even though the radio reading service could use the subcarrier without using these added services. Given the non-essential nature of these ancillary services, FCC guidelines in this area are inappropriate and whatever steps the parties decide to take to provide such services is purely within their discretion.

[40] In former Section 73.593, several noncommercial educational uses were permitted, including programs for the aged, ethnic minorities, and professional groups. *See* 47 C.F.R. § 73.593 (1981).

[41] 47 C.F.R. § 73.593.

[42] This *Policy Statement* supercedes the Bureau letter of December 3, 1984.

[43] This might include, *e.g.*, a station engineer who verifies the reliability of the technical installations, including the subcarrier's operation. Under these circumstances, a portion of the engineer's salary may be reasonably allocated to reading service subcarrier usage. Similarly, rent, administration, management and other appropriate costs attributable to reading service can be recovered if justified and segregable from other fixed overhead costs.

[44] *See* n. 14, *supra*.

[45] *See* n. 38 *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-182

In re Applications of

DOYLAN FORNEY	File No. BPCT-850213KF
TOLLESON BROADCASTING CORP.	File No. BPCT-850215KL
TOLLESON-GOMEZ COMMUNICATIONS, INC.	File No. BPCT-850215KN
ALDEN TELEVISION, INC.	File No. BPCT-850215LA
HECTOR GARCIA SALVATIERRA, LIMITED PARTNERSHIP	File No. BPCT-850215LB
AZTEC BROADCASTING CORP.	File No. BPCT-850215LG
ESTRELLA COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPCT-850215LK
MARICOPA MEDIA, INC.	File No. BPCT-850215LL
T.V. BROADCASTERS, INC.	File No. BPCT-850215LM
LI-COM LIMITED PARTNERSHIP	File No. BPCT-850215LN

For Construction Permit for a New UHF Television Station at Tolleson, Arizona

Appearances

Lauren A. Colby on behalf of Doylan Forney; *Gene A. Bechtel* on behalf of Tolleson Broadcasting Corporation; *Thomas L. Root* on behalf of Tolleson-Gomez Communications, Inc.; *Jerome S. Boros* and *Jerome S. Silber* on behalf of Alden Television, Inc.; *John C. Quale, Diane Z. Goldman* and *Alexandra M. Wilson* on behalf of Hector Garcia Salvatierra, Limited Partnership; *M. Scott Johnson, Ronald J. Jarvis*, and *Lynn M. Clancy* on behalf of Aztec Broadcasting Corporation; *William E. Zimsky* and *Hugh P. Taylor* on behalf of Estrella Communications, Limited Partnership; *James S. Kurz* on behalf of Maricopa Media, Incorporated; *Robert B. Jacobi*, and *Mark L. Pelesh*, on behalf of T.V. Broadcasters, Incorporated; *James A. Gammon*, and *Mark W. Amerman*, on behalf of LI-COM Limited Partnership.

DECISION

Adopted: September 22, 1988; Released: November 2, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Chairman MARINO:

1. This is the latest multi-party comparative broadcast case. *See, e.g., Susan S. Mulkey*, 3 FCC Rcd 590 (Rev. Bd. 1988); *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948 (Rev. Bd.), *recon. denied*, FCC 88R-52, released September 23, 1988; and *Religious Broadcasting Network*, 3 FCC Rcd 4085 (Rev. Bd. 1988). Ten applicants for a new television station on Channel 51 in Tolleson, Arizona (immediately adjacent to Phoenix, Arizona, the nation's 22nd largest television market), were compared in the Initial Decision (I.D.) of Administrative Law Judge Luton, 2 FCC Rcd 6935 (1987). Aztec Broadcasting Corp. (Aztec) and T.V. Broadcasters, Inc. (TVB) were found in the I.D. to be the top two comparative applicants, and Aztec ultimately was "preferred" because of its enhancement credit for broadcast experience. I.D., para. 159. All ten applicants have filed briefs and exceptions, and oral argument was heard on May 6, 1988. Twice following oral argument, this case was held in abeyance to permit the parties to negotiate a settlement. After considering the record in the light shed by the written and oral arguments and the most recent precedent, the Review Board has concluded that Hector Garcia Salvatierra, Limited Partnership (Salvatierra) is the preferred comparative applicant.

2. *Background:* Evidence was presented at the trial-type comparative hearing regarding the two pivotal comparative factors of: (a) diversification of media of mass communications; and (b) participation of ownership in the management of the proposed station. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), discussed in *Religious Broadcasting Network, supra*, 3 FCC Rcd at 4085-4088. The crisp and concise I.D. sets out the basic findings of fact (I.D., paras. 3-129) and conclusions of law (I.D., paras. 130-156) concerning each applicant. In his ultimate conclusions, the ALJ divided the ten applicants into two groups. The first group of five received either a decisive demerit on the "primary" diversification factor or little or no credit on the "substantial factor of participation of ownership in the management of the station," commonly referred to as the "integration" factor. I.D., paras. 157-160. Eliminated from further comparison in this initial group of five were Alden Television, Inc. (Alden) and Doylan Forney (Forney), both of which received decisive diversification demerits; Maricopa Media, Inc. (Maricopa) and LI-COM Limited Partnership (LI-COM), both of which received no (0%) integration credit; and Estrella Communications Limited Partnership (Estrella), which received 49% integration credit. I.D., para. 157. The remaining five applicants received no diversification demerits and were awarded 100% quantitative integration credit. They were further compared on the enhancement

factors of minority and female ownership, local residence and civic activities, and broadcast experience. I.D., paras. 158-160.

3. Since all of the applicants have filed exceptions to the I.D., we shall consider their principal arguments before selecting the superior comparative applicant. First, we turn to Alden and Forney, both of which as noted above, received decisive diversification demerits because on the controlling "B" cut-off date they owned other broadcast facilities. I.D., paras. 131, 136.

4. *Alden and Forney:* At the outset, a cursory examination of Alden's exceptions reveals they are nondecisional because they challenge only one of the grounds on which Alden lost. Thus, in its brief, Alden acknowledges that its "direct case disclaimed any integration credit," Br. 2, and I.D., para. 25. Alden also stated that it was "chargeable with three television stations (Channel 20, Denver, Colorado, Channel 24, Portland, Oregon, and Channel 22, Seattle, Washington)." Alden Br. 6-7. Nevertheless, Alden argues that "each of these markets is well-served by other mass media and, moreover, is many miles from Tolleson . . . Thus, in terms of . . . the diversification criterion, [Alden's] attributable media interests are insignificant." *Id.* at 7. Alden cites no authority for this argument, and we find no merit to its diversification claim. Both the Commission and the Board have held that even distant broadcast interests are significant in close comparative cases. *See* para. 6, below. In any event, Alden's case is not even close, for it admits that it sought no possible offsetting credit for participation of ownership in management of its proposed station. Accordingly, we concur in Aztec's observation that Alden's exceptions "do nothing to demonstrate error in the [ALJ's] determinations or to cure the basic irrelevancy of the Alden application . . . resulting from the utter absence of any integration proposal whatsoever." Aztec Reply 1.

5. Similarly without merit are Forney's exceptions to the ALJ's diversification analysis, I.D., paras. 131, 157. Forney admits that "at the time of the 'B' cut-off in this proceeding, Mr. Forney held a construction permit for a new AM broadcast station in Tucson, Arizona." Forney Br. at 12. Later, Forney sold the AM station, and now argues that since he "divested himself of the station and was in the process of doing so when he testified at the hearing . . . it would be unfair to charge [him] with the ownership of that facility." *Id.* Moreover, he argues, even if the ownership is attributable, it would result in only a slight diversification demerit[because] Tucson and Tolleson are more than 105 miles apart." *Id.*

6. Several of Forney's competitors correctly point out that both Commission and Board decisions have established that a divestiture commitment must be made by the "B" cut-off date; otherwise, a diversification demerit will be assessed for other broadcast interests. *Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730, 734 n. 18 (1986), *aff'd by judgment sub nom. Plantation Broadcasting Corp. v. FCC*, 812 F.2d 1443 (D.C. Cir. 1987); *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181 (Rev. Bd. 1986) (subsequent history omitted). Although Tolleson and Tucson may be some 105 miles apart, as Forney asserts, media interests more distant than Forney's have received significant diversification demerits. *See, e.g., Billy Purtle*, 43 FCC 2d 670 (Rev. Bd. 1973) (substantial demerits for AM station 180 miles distant) and *Joseph Bahr*, 92 FCC 2d 114 (Rev. Bd. 1982)(demerit for FM station geographically far removed from proposed station) (subsequent history omitted); *accord, CJL Broadcasting, Inc.*, 95 FCC 2d 544 (1983).

7. Here, there is no dispute about the controlling legal rule which the ALJ applied. In fact, at oral argument, counsel for Forney recognized the existence of the Commission's well-established practice of attributing other media interests in comparative cases, *unless* that applicant pledges by the "B" cut-off date to divest the broadcast interest if successful in the comparative case. Tr. 3040. Mr. Forney did not make a timely divestiture pledge, counsel candidly stated, because at the crucial cut-off date, Forney "had no intention of divesting himself of the AM station." *Id.* Forney's counsel acknowledged that his client is seeking a modification of the settled rule of practice because of his divestiture prior to hearing and merely raised the objection before the Board to preserve it on appeal. Tr. 3042. Neither the ALJ nor the Board is authorized to modify established Commission policy or practice. *See Horne Industries Inc.*, 91 FCC 2d 1193 (Rev. Bd. 1982), *remanded on other grounds*, 53 RR 2d 1647 (1983). We therefore affirm the decisive diversification demerit. This ruling moots additional exceptions which argue that: (a) Forney should have also been attributed ownership of an additional FM station in Arizona City, Arizona, because his timely filing of an application to assign that station could be unilaterally withdrawn or not consummated by Forney (LI-COM Br. 15-18); and (b) Forney's integration proposal should not have been credited because of his other extensive business interests, and because of the crucial reliance Forney places on an employee both in the management of his broadcast and other interests and in the present broadcast application. TVB Br. 34-37.

8. *Estrella and Maricopa:* Washington communications counsel organized both the Estrella limited partnership and the Maricopa corporation and took a limited partnership and non-voting stock interest, respectively, in the proposed stations. I.D., paras. 86-89, Maricopa Br. Exhibits 1-5. Several competing applicants argue that the record in this case is replete with evidence showing that Estrella and Maricopa were "controlled and manipulated from their inception[s] by their attorney organizers. Thus, neither is entitled to any credit for integration of ownership and management." *See, e.g.*, Forney Br. 9; Salvatierra Br. 47-48 and Reply 15-20; Aztec Reply 9-18.

9. Specific findings and conclusions in the I.D. regarding the Estrella application support the above allegation. They establish that its two communications attorneys (Taylor and Zimsky) were also limited partners with 17.75% and 9.5%, respectively, of equity ownership until July 30, 1985. I.D., paras. 65-66. Counsel's active participation is contrasted to the minimalist role played by the 51% managing partner, Ms. Arroyo-Duron, in the ALJ's detailed findings, I.D., paras. 85-89. Based on these findings, the ALJ held that:

> The record shows that the limited partners of Estrella organized the group, set up the application, and made virtually all of the important decisions. Ms. Arroyo-Duron did not know much of anything. She only knew some of the limited partners when she completed the application. She dutifully followed [counsel's] instructions by placing an "X" in the appropriate boxes in the application without having any knowledge of whether the representations thus made were true or false. A budget and

> business plan were prepared for the applicant by Mike Parker and Associates, but Ms. Arroyo-Duron did not know who requested the Parker firm to prepare these materials. She raised no question when this budget and business plan, which she had neither been requested or paid for, was presented to her by [counsel]. She exhibited utter confusion as to the negotiation of her own interest, the monies she had contributed to the applicant, how the application was prepared, and expenditures made by the applicant.

I.D., para. 144. Estrella was therefore awarded no credit for the proposed participation of Ms. Duron, who the ALJ found to be "unknowledgeable, confused and ineffective." I.D., para. 143.[1]

10. In his I.D., the ALJ did not have to reach the question of whether Maricopa's counsel (Kurz), who received 41.25% of the corporation's total stock, albeit in the form of Class B non-voting stock, actively participated in the applicant's affairs. I.D., para. 91. Maricopa was awarded no integration credit because the record established that on the crucial "B" cut-off date, April 17, 1985, Maricopa was simply an informal association of individuals. *Id.*, I.D., paras. 98-99, 147. We need not reach whether the ALJ's basis for denial of integration was correct because, as will appear below, the record reveals a more basic defect in both Estrella's and Maricopa's comparative cases.

11. After the I.D. was released in this proceeding, the Board issued four decisions which amplify the legal bases for decisively reducing the integration credit to both Estrella and Maricopa. *See Mark L. Wodlinger*, 3 FCC 2d 3139 (Rev. Bd. 1988); *Washoe Shoshone Broadcasting, supra* ; *Religious Broadcasting Network, supra;* and *Stanly Group Broadcasting Inc.*, 3 FCC Rcd 5017 (Rev. Bd. 1988). This quartet of cases fully reviewed controlling Commission policy, *i.e.*, the *Clarification on Ownership Attribution*, 1 FCC Rcd 802, 804 (1986), before concluding that "the Commission has held, as a matter of law, that attorneys who hold equity interests in an applicant and who simultaneously perform legal services for that applicant cannot be considered mere 'passive investors.'" *Religious Broadcasting Network, supra*, 3 FCC Rcd at 4093. In *Mark L. Wodlinger, supra*, at 3141, the Board had attributed to the applicant in question the equity interest of an attorney-principal, a limited partner, who had performed legal services for the applicant. And, in *Stanly Group, supra*, at 5019-5020 and *Washoe Shoshone, supra*, at 3953, the Board concluded that the Commission's policy also applied to lawyers who provided legal advice to corporate applicants and held equity interests in the form of preferred and non-voting stock, respectively.

12. Estrella's two attorneys, who held more than 27% of the partnership's equity, were found in the I.D., paras. 85-89, to have actively participated in the applicant's affairs from the formation of the application until after the application had been designated for hearing. *See* para. 9, above. Maricopa's counsel has held and continues to hold 41.25% of the corporation's stock and candidly stated in his brief that in his role as counsel of record "he is involved in most decisions of the corporation." Maricopa Br. 13; *see also id.*, Exhibits 1-5 which show his central role in the structuring of the corporation. Applying the Commission's policy views, we hold that these interests cannot be deemed passive; they must be attributed, and therefore substantially reduce Estrella's maximum integration credit to 63% and Maricopa's to 58.75%. This reduction of credit is decisive, *see* para. 42, below; thus, we need not decide whether credit should be further reduced as the competitors contend.

13. *LI-COM*: The Initial Decision contains the following findings regarding LI-COM's Limited Partnership agreement:

> Section 7.4(b) . . . provides that the limited partners, upon the affirmative vote of the holders of record of a majority-in-interest of the limited partners' interest may cause the termination and dissolution of the partnership. Section 7.4(d) of the Agreement provides that the limited partners, upon the affirmative vote of a majority-in-interest, may cause the sale of all or substantially all of the assets of the partnership in a single sale or in multiple sales. These are all actions which may be taken by vote of a majority-in-interest of LI-COM's limited partners; none of these actions would require the concurrence of the general partners. Finally, under Section 6.8 of the Agreement, without the affirmative vote of a majority-in-interest of the limited partners' interests, a general partner may not withdraw from the partnership.

I.D., para. 127.

14. In essence, LI-COM was denied ownership integration credit by the ALJ because the partnership agreement established that "control of the partnership rests with the limited partners." I.D. at para. 153. The ALJ reasoned that "the precarious positions of the general partners inspire no confidence that the proposed" station will be controlled by the general partners. *Id.* Thus, the basic decision to continue the business is left exclusively to the limited partners, who by a simple majority vote, without the concurrence of the general partners, may terminate, or dissolve the partnership. This power of life or death over the venture gives the limited partners "great power to dictate the actions of the general partners . . . [w]hile some day-to-day operations may be left to them." I.D., para. 154. Since the potential threat to terminate is always present, the general partners must be "quite receptive to directions from the limited partners concerning the course the station will take." *Id.* Moreover, the limited partners' position is further strengthened by their power to prevent the general partners from abandoning the venture without their permission. *But see Religious Broadcasting Network, supra*, at 4098-4099. The LI-COM limited partners, by a majority vote, may terminate the partnership "solely for the purpose of replacing the general partners, then resume business as a new partnership . . . [or] . . . elect to sell all of the assets of the partnership to an entity, one which would not include the present general partners, who then would be without a station to own and manage." I.D. at para. 155.

15. LI-COM excepts to the ALJ's ruling because its agreement allegedly complied with the Uniform Limited Partnership Act of 1976 (ULPA), and because the Commission's 1984 Report and Order, *Attribution of Ownership Interests*, 97 FCC 2d 997, 1023 (1984), established that compliance with the ULPA provided sufficient insulation of the limited partners. The more stringent policy, according to LI-COM, was not adopted by the Commission until

after the pertinent "B" cut-off date in this case, and therefore should not be applied to its agreement retroactively. Aztec and Salvatierra in their reply briefs (pp. 4-5 and pp. 10-15, respectively) challenge LI-COM's claim that its agreement complies with the ULPA. They note that the ULPA does contemplate that the limited and general partners, *together*, may exercise the powers which the ALJ discussed in this case. Here, however, the ALJ's concern was based on his finding that pursuant to the agreement those powers could be exercised by the limited partners *alone*. Thus, as Aztec submits: "There is a quantum leap between having the right to vote on a matter and having the exclusive right to vote on it," as do the LI-COM limited partners. Aztec Reply 5.

16. All the parties recognized that the question of whether comparative credit may be awarded a partnership agreement turns not on the ULPA, but ultimately on Commission *comparative precedent*. Thus, as in *Payne Communications, Inc.*, 1 FCC Rcd 1052, 1054-1055 (Rev. Bd. 1986), the Board analyzed the partnership in the light shed by the Commission's seminal decision in *Anax Broadcasting, Inc.*, 87 F.C.C. 2d 483 (1981), pointing out that although the refinement of the insulation standard has continued to evolve over time, the basic standard adumbrated in *Anax* that limited partners must be merely passive investors with no control over the licensee was well-established law prior to the Commission's 1984 *Attribution* statement. Thus, in *Payne*, where the limited partners were free to remove the general partners at their discretion, as in the present case, the Board held that the interests of the limited partners could not be "deemed inconsequential to the integration analysis" because "the general partners were [not] properly insulated from the possibility of control or influence by the limited partners." 1 FCC Rcd at 1055.

17. Even earlier, in *Family Media, Inc.*, 102 FCC 2d 752, 756-757 (Rev. Bd. 1985), the Board remanded for a fuller hearing a partnership agreement which allegedly required a limited partner to consent to the dissolution of the partnership, and the limited partner enjoyed sole power to select the liquidating trustee. Recently, in *Susan S. Mulkey, supra*, at 592, the limited partners had retained broad authority to remove the general partner and unlimited power to call meetings, dissolve the partnership, and sell all of its assets. Retention of those powers in *Mulkey*, as in *Payne*, defeated the partnership's claim of comparative credit. These cases, which all rest firmly upon the Commission's *Anax* decision, support the ALJ's conclusion that LI-COM is not entitled to any integration credit, a conclusion we hereby affirm. This conclusion renders moot the additional contention that the partnership is actually controlled by Mr. Lavin, a putative limited partner.

18. *Tolleson-Gomez Communications, Inc.* (*Gomez*) : Gomez, a corporation with two classes of stock, was awarded 100% integration credit for the participation of its two voting stockholders, Benjamin Gomez (51%) and Maureen Smith (49%). I.D., paras. 17-24, 134. Six competing applicants have filed exceptions challenging the award. *See* Briefs of Aztec 12-15; Forney 7; LI-COM 20-22; Salvatierra 29-34; TVB 21-27; and Tolleson Broadcasting Corp. 5-7, 26-28. Gomez did not file a written reply, nor did it appear at oral argument, to respond to the exceptions of its competitors. In their briefs, both Salvatierra and TVB have filed detailed exceptions contending that Gomez is a classic sham controlled by its nonvoting shareholder, and structured solely for comparative enhancement purposes. *Id.* As previously noted, Gomez did not file a written reply or appear at oral argument to respond to these serious allegations. However, we need not reach this broader and somewhat subjective argument, because several other parties have presented a narrower and more concrete contention that is fully supported by the record and is dispositive. *See, e.g.*, Aztec Br. 12-15, LI-COM Br. 20-22.

19. At the time of the hearing, Ms. Maureen Smith, was 21 years old, held 49% of Gomez's voting stock, and was the proposed station's Director of Public Relations. She had no prior business experience, either in broadcasting or public relations. Her only fulltime job had been as a housekeeper or maid at a private club where Mr. Gomez, the corporation's other voting stockholder worked. Tr. 563-65; 582-83. The applicant Gomez had the burden of proving at the hearing that a reasonable likelihood existed that Ms. Smith's integration proposal would be effectuated on a "fulltime" and "permanent" basis, and that her position with the station included either "policymaking" or "management" type functions. *See generally Policy Statement on Comparative Broadcast Hearings, supra*, 1 FCC 2d at 395. LI-COM argues that the record indicates that Ms. Smith "is a mere figurehead" who has not and will not effectively participate in the station's management. LI-COM Br. 20-22. Aztec adds that Smith's proposal to work at the station lacks both permanence and a demonstration that her duties are managerial. Aztec Br. 12-15. Our review of the record confirms the validity of these undisputed exceptions.

20. Smith has served as the corporation's secretary and vice-president. The record establishes, however, that she did not participate in formulating the applicant's budget, or in securing its bank letter. She did sign corporation checks, but did not receive or review any bills or invoices, nor did she satisfy herself that a specific check should be issued to a particular payee. Instead, she completely relied on Gomez's instructions because "I trust Ben." Tr. 568, 570-574. At the hearing, Ms. Smith demonstrated a similar non-involvement, passivity, and lack of knowledge regarding her proposed role as the station's Director of Public Relations. She had no knowledge about what that position entailed beyond what had been previously been written in the applicant's direct case exhibit. Gomez Ex. 3, Tr. 567-68, 592-594. She believed that programming and public relations would be different station departments. Tr. 568. Later she testified that her employees would be working in the News and Programming Departments, but she did not know whether she would be responsible for selling, advertising, or appearing on camera in her role at the station. Tr. 572, 592-93. Finally, Ms. Smith testified that she would "probably" make the position her fulltime job. Tr. 594. Considering these record facts, in light of well-established precedent, we will reduce Gomez's integration credit by the elimination of Smith's 49% interest. It is undisputed that Gomez has failed to meet its burden of establishing that Smith's proposal is realistic, managerial, permanent, or will be fully effectuated. *See e.g. Utah Television Associates*, 102 FCC 2d 1470, 1478-79 (Rev. Bd. 1985), affirming denial of credit where principal's role was passive, unfocused, and unknowledgeable, and *Jarad Broadcasting Co., Inc., supra*, at 183-184, credit reduced for passivity and lack of knowledge about significant aspects of the proposal.

21. *Tolleson Broadcasting Corp. (Tolleson)* : A corporation with two stockholders, Diane Knigge, 76%, and Nina Ortega, 24%, Tolleson was awarded 100% quantitative integration credit. I.D., paras. 11-16, 132. At the time of the hearing, Ms. Knigge was a 28 year old accountant and Ms. Ortega a 25- year old law student. I.D., paras. 14, 16. Several competing applicants have challenged this award in their exceptions contending that the integration proposal is inherently incredible, a sham, and neither genuine nor permanent. Aztec Br. pp. 9-12; Gomez Br. pp. 5-8; Salvatierra Br. pp. 24-27; and LI-COM Br. 18-19. Specifically, relying on circumstantial evidence, they suggest that the real-party-in-interest may be an attorney who has filed broadcast applications in the past. He informed Ms. Knigge about the availability of the Tolleson channel, provided her with the name of legal counsel, and advised her how to structure the application for comparative purposes. They point out that Ms. Knigge recruited Ortega upon learning that a female or minority would enhance her application, but argue that Ms. Ortega has demonstrated no real commitment to the application and appears to be a shareholder in name only: Ms. Ortega paid for her stock with a500 gift from Ms. Knigge and an alleged "oral"1,900 loan from Ms. Knigge, and her only contribution to expenses was100. Two of the challengers, Aztec and Gomez, further point to the fact that both principals recently embarked on professional careers (Ms. Knigge became a CPA in 1985; and Ms. Ortega in 1986 was a successful law student, in the top 15% of her class) and argue that its not credible that either would abandon their chosen careers after having respectively completed rigorous accounting and legal education. Salvatierra adds in this regard that Ms. Ortega has been offered a position at a prestigious law firm in Phoenix, and cites to Ms. Knigge's proposed reliance on "consultants" to manage the corporation's affairs. Salvatierra raises a further argument that the organizational structure remained tenuous on the "B" cut-off date, April 17, 1985, and that corporate by-laws and signed stock certificates were not executed until six months after the cut-off date, thus violating the Commission's requirements set out in *Pacific Television, Ltd.*, 2 FCC Rcd 1101, 1102 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1700 (1988). Finally, both LI-COM and Salvatierra contend that Ortega's integration commitment is too conditional to award the applicant credit for her proposal. They argue that she testified that she would go back to the practice of law if the station is not profitable within a couple of years.

22. We need not reach the delicate and more subjective and difficult question of whether Tolleson's integration proposal lacks reality and genuineness in light of our concurrence with the briefs that the record evidence is too equivocal to provide the requisite assurance that Ms. Ortega's integration is sufficiently permanent to merit full integration credit. The Commission emphasized in its *Comparative Policy Statement*, *supra*, that "it is important that integration proposals be adhered to on a permanent basis." 1 FCC 2d at 395 n. 6. And, in *Signal Ministries, Inc.*, 104 FCC 2d 1481, 1497 n. 16 (Rev. Bd. 1986) (subsequent history omitted), the Board rejected the integration commitments of two principals who, pursuant to a Stock Transfer Restriction Agreement, were subject to sell most of their stock interests after a two-year period. Our *Decision* specifically rejected the argument that a two-year period provides more stability than what is required by Section 73.3597(a)(l) of the Commission's rules, 47 CFR §73.3597(a)(l) (applicant prevailing in comparative hearing free to sell facility after one year of on-air operation). *See alsoReligious Broadcasting Network*, *supra*, 3 FCC Rcd at 4094. Here, Ms. Ortega's financial posture significantly impacts on the resolution of this matter. She has educational loans to repay, and expects to work at the station for at least one, and possibly two, years before drawing any salary, indicating simply that she would live on unspecified credit in the meantime. Aztec Br. 11 citing Tr. 323; *see also* Tr. 375. Viewed with the perspective that she is in debt and may be required to live for an extended period of time without a salary, that her current financial stake in the applicant is relatively minor, that Ms. Knigge has indicated she will use consultants to the extent necessary, and that Ms. Ortega can conveniently and flexibly return to a legal career, we find it significant, in ascertaining the permanence of her commitment, that she would return to law in "a couple--a few years, probably several years" if the station were not profitable. Tr. 374-375. This matter is close, but we are of the view that the evidence (which the applicant has the burden of establishing) does not support a finding favorable to the applicant, particularly if this factor were decisive against an applicant in which there were no doubts concerning its principals' integration commitments. *See* paras. 32-41, below. Even if we were to award Tolleson all of the quantitative integration credit it seeks, however, that applicant would nonetheless fall short of Salvatierra's qualitative enhancements (100% minority, 100% service area residency, 100% civic activities, and 100% broadcast experience). Tolleson is equal on service area residency and ahead on female preference (100% vs. 0%), but behind on minority credit (100% vs. 24%), civic activities (100% vs. 0%), and broadcast experience (100% vs. 0%). *Cf. MTF Enterprises*, 99 FCC 2d 297, 300 (Rev. Bd. 1984)(minority ownership and participation has more significance as enhancement factor than female ownership and participation), *review denied*, FCC 85-429, released August 2, 1985, *recon. dismissed*, FCC 85I-153, released October 31, 1985. In sum, Salvatierra is clearly comparatively superior over Tolleson.

23. *T. V. Broadcasters:* TVB received 100% credit for its four voting stockholders who proposed to participate full-time in the management of the station. I.D., para. 149. The four stockholders are: Laura Duran-Martinez, 25%; Esther Angulo, 25%; Rebecca Martinez, 25%; and Jacquelyne Zillioux, 25%. I.D., paras. 99-112. Several applicants have excepted to the award of integration credit for the proposed participation of Ms. Angulo and Ms. Zillioux, because neither will be employed at the proposed station in a "managerial" or "policy making" capacity. *See, e.g.*, Estrella Br. 31-33; LI-COM 22-25. They claim that no evidence was offered at the hearing that either Ms. Angulo or Ms. Zillioux will be involved in policy making or that they will fill important management positions. They point out that the Commission has stated that: "In assessing proposals, we will also look to the positions which participating owners will occupy, in order to determine the extent of their policy functions and the likelihood of their playing roles in management . . . . Merely consultative positions will be given no weight." *Policy Statement on Comparative Broadcast Hearings*, *supra*, 1 FCC 2d at 395.

24. Ms. Angulo will work at the proposed station "in the capacity of office manager and director of human resources and equal opportunity compliance. Ms. Angulo will be responsible for supervising the administrative operation of the station; she will report directly to Laura

Duran-Martinez." I.D., para. 103. Generally, the role of office manager has not been awarded integration credit. In *Makai Broadcasting, Inc.*, 102 FCC 2d 322, 324 (Rev. Bd. 1985), we held that a station's proposed office manager, bookkeeper, and traffic manager was not entitled to integration credit because "occupational duties typically associated with the positions of bookkeeper, office manager, and traffic manager have not been deemed managerial . . . " citing *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 493-494 (Rev. Bd. 1984)(subsequent history omitted). In *Apogee, Inc.*, 99 FCC 2d 979, 987 (Rev. Bd. 1985), *modified and affirmed*, 59 RR 2d 941 (1986), the Board observed that "without management and policy functions an applicant's principals do not merit ownership integration credit." *Accord Ft. Collins Telecasters*, 103 FCC 2d 978 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 2780 (1987), *aff'd*, 841 F.2d 428 (D.C. Cir. 1988); and *Payne Communications Inc., supra*. Assuming, *arguendo*, that Ms. Angulo's additional role of "Director of Human Resources and Equal Opportunity Compliance" is a managerial function, TVB is still not entitled to any integration credit. In *Payne Communications, supra*, 1 FCC Rcd at 1057, no credit was awarded where the principal would work as office manager and proposed to implement the EEO program, because of the blurring of non-management and management functions, on the rationale that the proposed position would not sufficiently involve policy making and station management functions. *Accord Apogee, supra*. Similarly, Ms. Angulo's proposed role at the station blurs the lines between management and non-management functions and her 25% ownership interest cannot be credited.

25. Ms. Zillioux "will advise the station on programming and will assist in the recruitment of minority employees" and she will report directly to Ms. Duran-Martinez. I.D., para. 111. Absent a showing that a principal will participate in policy making or management, no credit will be awarded. "Merely consultative positions" are entitled to "no weight." *Policy Statement, supra*, 1 FCC 2d at 395; *see also Reginald A. Fessenden Educational Fund, Inc., supra*, 100 FCC 2d at 451. Ms. Zillioux's functions as found by the ALJ are advisory and consultative in nature: she advises regarding programming and assists in recruiting minority employees. Thus, her 25% interest may not be credited as managerial. In sum, TVB's integration credit must be reduced to 50% by the elimination of 25% credit awarded each to Angulo and to Zillioux. This reduction of TVB's credit is decisional, *see* para. 42, below, and renders moot the additional exception that TVB's corporation is "a creature of" and controlled by Roger McKinnon, a non-voting stockholder. *See, e.g.*, Salvatierra Br. 17-21.

26. *Aztec:* Like TVB, Aztec is a corporation with voting and non-voting stockholders. Aztec was awarded full credit for Mary Wilson, 51% voting stockholder, and Caroline Walker, a 47% voting stockholder. I.D., paras. 44, 140. Aztec was thus given 98% credit, which the ALJ held "effectively equals 100% quantitative integration credit. *Vacationland Broadcasters*, 55 RR 2d 1299, 1306." I.D., para. 140.

27. Enrique W. Iglesias, the corporation's Secretary and third Director along with Wilson and Walker, owns the remaining 2% voting stock but does not seek integration credit. Iglesias is also the owner of 4,000 common non-voting shares and 40.4% of the total corporate equity. Dr. Richard Lesnau owns the other 4,000 non-voting shares, and 40% of the total equity. I.D., para. 44.

28. Seven of the competing applicants urge that Aztec's integration proposal must be disregarded because Iglesias, with more than 40% of the equity, plays an "active" and "dominant role" in the corporation. *See, e.g.*, TVB Br. 7-12; and Salvatierra Br. 9-15. In the alternative, they urge that, as in Maricopa's case, the ALJ should not have recognized Aztec's proposal because of the "inchoate ownership structure" and uncertainty about its corporate structure on the "B" cut-off date; and that Walker's integration credit must be substantially reduced because of her substantial and conflicting duties in the state legislature. TVB 14-15; Salvatierra 14-15 n. 7.

29. In support of their contention that Iglesias is in control, the following additional findings of fact are proposed as supported by the record:

(a) It was Iglesias who commissioned Aztec's technical consultant to provide technical and engineering consulting services, to collect information on projected operating costs, and to prepare an economic analysis of the Phoenix market. Tr. 808-09, 818, 823. Mr. Iglesias was also personally responsible for hiring Aztec's corporate counsel, engineer, and communications counsel. Tr. 822-23. Iglesias was the only Aztec principal involved in obtaining reasonable assurances of a transmitter site. Tr. 823-26.

(b) Iglesias and Dr. Lesnau, the other nonvoting shareholder, are responsible for obtaining the financing for the proposed station. Tr. 1144. In contrast, Ms. Wilson, president of Aztec and a 51% voting stockholder, did not make any efforts personally to obtain financing for Aztec. She had never seen a financial statement of Iglesias or Lesnau, nor did she present them with her financial statement. Tr. 881, 900. Wilson testified that she is responsible for her "equity in the company--for 10.2% of the liabilities or assets" based on "mutual trust." Tr. 895, 1145. Neither she nor Ms. Walker, the applicant's vice president and 47% voting shareholder, however, gave a personal guarantee for station-related or corporate expenses. Tr. 895, 1139.

(c) Until November 1985, six months after the "B" cut-off date, Iglesias served as treasurer of Aztec. In this position, he prepared all of the corporation's checks, had general custody of corporate funds, and was responsible for preparation of legal and financial statements and reports. Tr. 811-12, 818, 984-35; Salvatierra Ex. 5, p. 9. The address for Aztec on its application is the same as Mr. Iglesias' business address, and he receives mail for the corporation as its statutory agent. Tr. 895-96.

(d) Iglesias' official corporate duties, moreover, have not been limited to his responsibilities as Aztec's treasurer. Until September, 1985, Iglesias proposed to work full-time at Channel 51 as business and sales manager. Tr. 892. He has also been a director and secretary of Aztec since it filed its application for the station. Tr. 885. He has attended directors' meetings and has been responsible for keeping minutes of those meetings. Tr. 832-836. As a director, Mr. Iglesias is also empowered to manage Aztec's "business and affairs," serve the corporation in any capacity, receive compensation, and, significantly,

make all rules he deems expedient concerning the issue and transfer of stock. Salvatierra Ex. 4, pp. 3, 7 and 11.

30. Aztec does not dispute these facts in its Reply brief. On the contrary, it argues that it "has never represented Mr. Iglesias to be anything other than what he is: a 2% voting shareholder, secretary and director of the applicant." It points out that Iglesias is also a minority group member and local resident, and notes that, unlike sham cases where applicants have tried to "conceal the participation of their non-integrated principals in their corporate affairs, Aztec had no reason to, and did not do so." Reply 13-14.

31. The award of an "effective" 100% integration credit based on the commitments of Wilson and Walker alone, does not adequately reflect the true corporate realities of Aztec's integration proposal. Award of full credit without considering Iglesias' influence, and the competitors' allusion to marred "passive investor" precedent when referring to Iglesias, both convey in concrete terms the *de minimis* significance attributed to Iglesias' 2% voting stock. Yet, the record establishes that Iglesias is more than a nominal 2% voting stockholder, secretary, and *director*, whose proposed non-integration in station operations can simply be discarded without prejudice to the comparative posture of the competing applicants. The application, as filed, depicted that he was in control of more than 80% of the applicant's equity (his wife owned all of the non-voting stock) and that percentage, although reduced by the "B" cut-off date, is still a significant 40.4%. In addition, he is one of three directors of the applicant; and, as we have noted recently in *Stanly Group Broadcasting, Inc., supra*, at 5019 and *Religious Broadcasting Network, supra*, at 4099, in attributing the equity interests of non-integrated directors to the applicant, "corporate directors" are "responsible for the determination and execution of corporate policy as well as being charged with 'supervision and vigilance for the welfare of the whole enterprise,'" citing H.G. HENN & J.R. ALEXANDER, LAWS OF CORPORATIONS §§203, 207 (1983). Finally, and more important, the undisputed record evidence summarized above establishes that Iglesias has been the prime mover who has dominated the original initiation and the more recent prosecution of the application. In light of this record, it is only appropriate that Iglesias' full equity interests, at minimum, be factored into the integration analysis. *Cf. Las Americas Communications, Inc.*, 1 FCC Rcd 786, 793-794 (Rev. Bd. 1986)(Board rolled back an applicant's integration proposal to its pre-"B" cut-off status after one of its stockholders, proposing only part-time integration credit reduced his 20% voting interests to 0.5% on "B" cut-off date, substituting the main portion of his equity ownership to non-voting stock in an attempt to garner more quantitative integration credit; there 99.5% full-time and 0.5% part-time). We need not calculate the precise percentage of quantitative integration credit that Aztec is entitled to, if any, however, because inclusion of Iglesias' non-integrated 40% non-voting equity is decisive in this case. *See* para. 42, below; *Cf. Washoe Shoshone Broadcasting*, FCC 88R-52, released September 23, 1988 (no integration credit awarded where applicant's ownership structure too fluid to be precisely ascertainable). Aztec, as it claims, may not have had the customary reason to concoct a sham case since Iglesias is a minority group member, and local resident. However, by structuring the applicant the way it did, Aztec attempted to artificially gain a decisive qualitative enhancement for female ownership.

32. *Salvatierra:* Hector Garcia Salvatierra, a limited partnership, was awarded "100% quantitative integration credit for the fulltime involvement of its sole general partner" Salvatierra as the general manager of the proposed television station. I.D., para. 137. Two limited partners, The Jemison Investment Co., Inc. and Predrag Mitrovich, I.D. paras. 32, 36-39, are entitled to 48% of the partnership's profits, and the general partner is entitled to 52% of the profits. I.D., para. 32.

33. Four competing applicants have filed substantial exceptions which argue that Salvatierra is not entitled to 100% credit. Aztec 15-18; Forney 11; Tolleson Broadcasting 7-11, 28-29; and TVB 19-21. Gomez's brief, at 10-11, like the rest of its case, is garbled. The legal sufficiency of the Salvatierra partnership agreement is not in dispute (as it was, for example, in the LI-COM agreement, paras. 13-17 above). In fact, Tolleson Broadcasting states that: "The legal paperwork with regard to the limited partnership has the appearance of being immaculate. The agreement contains traditional provisions with regard to the limited powers of the limited partners and the broad powers of the general partner." Br. 8. And, TVB asserts that: "The partnership agreement does not simply insulate the limited partners from management or control of the partnership business; it leaves them powerless." Br. 20. Nevertheless, invoking *KIST* and its progeny, the applicants filing exceptions on this point argue that Salvatierra's integration proposal should be discredited because Salvatierra has "a completely free ride," (Aztec Br. 17); does not have "to make any capital contribution," (TVB Br. 19); "has zero investment in the venture, with no commitment to make any investment," (Tolleson Broadcasting Br. 11); "has never contributed a dime to the venture," (Forney Br. 11); and has contributed "absolutely nothing to the cost of going forward." (Gomez Br. 10).

34. The limited partners are committed to invest 3,000,000 of which 200,000 covers the filing and prosecution of the application, and2,800,000 covers station construction and operation. The losses are to be allocated 20% to the general partner, and 80% to the limited partners; profits are to be divided 52% to the general partner and 48% to the limited partner. Aztec argues (Br. 17) that pursuant to his agreement, Mr. Salvatierra "gets a completely free ride." TVB adds (Br. 21) that the limited partnership agreement "is so one-sided that no rational limited partner investor would ever enter into it." But, this analysis of the partnership agreement conflicts with that of Tolleson Broadcasting which argues (Br. 9) that the 52-48% division of the profits does not accurately reflect the respective interests of the parties because: "(a) The 48-52% division of partnership profits does not occur until an amount, from profits, is allocated to the limited partners equivalent to annual interest on their investment at specified prevailing rates. . . . Depending on the circumstances, but considering the large size of their investment, this could substantially reduce or even eliminate the profit subject to the 48-52 division, giving the limited partners the vast majority or all of the profits. (b) Distributions of profits are restricted if the ratio of liabilities to invested capital exceeds 1.5 to 1. . . . For this purpose, lease obligations are considered liabilities. . . . If major, long term leases are entered into, this could have a profound limiting impact on distribution of profits to the

partners." Finally, Tolleson argues, Br. 10, that the record does not reveal who has been the moving force in the Salvatierra venture.

35. Salvatierra replies that, contrary to its competitors' claims, the record before the ALJ established that Mr. Salvatierra was the moving force behind the application and has sole power to control its operations under the partnership agreement. He located the limited partners and obtained their financial commitments; selected and hired legal and engineering counsel; chose the partnership form and negotiated the partnership agreement; negotiated with equipment vendors; supervised the preparation and completion of the application; and was responsible for extensive research and analysis of the community and the development of specialized programming proposals and exhibits. Salvatierra Ex. 2, pp. 1-2; Tr. 616-621. Salvatierra, in fact, has made a substantial financial commitment to the partnership. He has contributed his pre-organizational expenditures to the partnership and he has spent additional funds which did not flow through the partnership's capital accounts. Moreover, as a general partner he will be personally liable for the partnership's obligations including any loans required to complete construction of the proposed station. Tr. 665-66; Arizona Rev. Stat. Ann. §29-324 (1982). Thus, Salvatierra, unlike many of his critics' principals, "put his own financial future on the line in pursuit of his goal to establish a new media voice in Tolleson." Salvatierra Reply 2-5.

36. All of Salvatierra's competitors base their challenges to his integration credit on the contention that he has not made any financial or capital contribution to the partnership (*see* para. 33 above). In *KIST*, *supra*, the Commission rejected the proposition that "failure to make a financial contribution to the corporation or incur financial obligations, by itself, precludes . . . finding . . . an ownership interest creditable for integration purposes." 102 FCC 2d at 292. An ownership interest may be discarded for integration purposes if the surrounding circumstances raise substantial questions about the *bona fides* of the ownership arrangement. Here the totality of the circumstances before the ALJ did not call into question the *bona fides* of Salvatierra's interest. *Compare Signal Ministries, Inc.*, *supra*, 104 FCC 2d at 1496.

37. In his I.D., the ALJ found that Salvatierra, a 46 year old Hispanic male, was born in Tucson, Arizona, and has resided in the proposed service area during the last 12 years. I.D., para. 33. From 1976 until 1983, Salvatierra worked as the comptroller and business manager of a local television station, KOOL-TV. I.D., para. 34. Substantial evidence establishes that Salvatierra was the moving force behind the application in this case and that he sought out the limited partners who agreed to invest in the venture. There is no doubt that the agreement they signed grants Salvatierra sole *de jure* authority, as managing partner, to manage the proposed station.

38. Two exceptors analyze the partnership agreement and claim that the limited partners made such a bad business deal that "no rational limited partner investor would ever enter into it." However, another challenger counterclaims that the limited partners have protected their investment to the point that the 52-48 profit split may be illusory. *See* para. 33, above. For purposes of our comparative analysis, it is significant that no party has attempted to show that the limited partners have or will exercise *de facto* control over the partnership. We are therefore obliged to follow the Commission's teaching that "where there is a written agreement" establishing *de jure* authority and "no evidence that the agreement has been ignored," generalized allegations that the comparative proposal was not advanced in good faith will not be credited. *KIST*, *supra*, 102 FCC 2d at 291 n. 8. We therefore affirm the ALJ's award of 100% integration credit to Salvatierra.

39. One argument remains. Salvatierra is a director of the Broadcast Capital Fund, Inc., a tax-exempt, non-profit venture capital organization which provides financing and training to minority persons who seek to acquire and operate broadcast stations. I.D., para. 40. The Fund, and an affiliate, hold warrants to purchase non-controlling minority interests in some of the stations to which financing is provided. Such warrants are held for investment purposes, and the Fund and its affiliate, do not presently own direct interest in any broadcast station, nor have they ever exercised any warrants. I.D., para. 41. Accordingly, the ALJ concluded that the unexercised warrants of this non-profit investment company which assists minority broadcaster "are not cognizable for diversification purposes," citing *Attribution of Ownership Interests*, *supra*, 97 FCC 2d at 1021-1022. I.D., para. 138. Forney and TVB have filed exceptions to the ALJ's ruling. No reasons are offered by Forney (Br. 11) in support of its exception. TVB argues (Br. 15-19) that the ALJ erred in relying on the Commission's multiple ownership attribution standards in this comparative proceeding.

40. We disagree. Warrants, debentures, and other convertible interests were declared not to be cognizable ownership interests by the Commission in its *Attribution* Decision, *supra*, 97 FCC 2d at 1021-22, since they "can be bought and sold for value without ever being converted to stock." Such devices, along with non-voting stock, provide a valuable means by which existing and prospective licensees can raise new capital without diluting their control over their companies. *Id.*, at 1020. And, in *Daytona Broadcasting Co., Inc.*,103 FCC 2d 931, 934 (1986), the Commission held that its attribution policy would apply to comparative cases.

41. Moreover, we have previously held that where it is unlikely that a convertible interest will be exercised, the potential ownership interest will have no impact on the comparative analysis. *Signal Ministries, Inc.*, *supra*, at 1491. In declining to assign a diversification demerit in that case, which involved media interests owned by a subsidiary of the parent company of First Small Business Investment Company of California (Company), which, in turn, owned convertible debentures in an applicant, we took into consideration the fact that Company was a business investment company which was primarily interested in financial profit. It was unlikely that Company would be interested in exercising control over the applicant's stock unless, as would be the case with any other lender, it deemed its loan to be in jeopardy because of station performance. *Id.* That appears to be the case here, since the venture capital Fund has not once exercised a warrant in order to retain broadcast stock. Additionally, Salvatierra is a mere director of the Fund and has no ownership interests in any of the stations that have received compensation from the Fund. Salvatierra's relationship with those stations is "simply too remote and attenuated to be given weight as comparative factor in this case." *Waters Broadcasting Corp.*, 88 FCC 2d 1204, 1206 (Rev. Bd. 1981) (subsequent history omitted). We therefore affirm the ALJ's conclusion that the unexercised warrants are not an attributable interest.

42. *Briefly summing up:* the Board has affirmed the award of decisive diversification demerits to Alden and Forney, paras. 4, and 7. Following Commission policy, it has attributed counsel's ownership interest and reduced Estrella's credit to 63% and Maricipa's to 58.75%, para. 12. It has affirmed the ALJ's conclusion that no credit can be awarded to LI-COM because its limited partners retained broad authority over the general partners, para. 17. Based on the record and arguments of the parties, Gomez's credit was reduced because it failed to establish that a 49% principal's integration proposal would be effectuated, para. 20. Tolleson's integration credit must be reduced because of the conditional nature of its 24% principal's participation, para. 22. TVB's principals failed to establish that their positions are managerial or policymaking, thus reducing its integration credit to 50%, paras. 24-25. Aztec's proposal must be substantially reduced by at least 40% because of the active participation of a stockholder who also held a 40% non-voting interest, para. 31. Finally, the Board has affirmed the ALJ's award of 100% integration credit to Salvatierra. The quantitative difference between 100% integration credit to Salvatierra and those applicants which have received credit, ranging from 50% to 76%, is more than sufficient to sustain a grant of the Salvatierra application, without relying on its enhancement factors which are also significant. *See* I.D., para. 137, and para. 22 above.

43. ACCORDINGLY, IT IS ORDERED, That the applications of Doylan Forney; Tolleson Broadcasting Corp.; Tolleson-Gomez Communications, Inc.; Alden Television, Inc.; Aztec Broadcasting Corp.; Estrella Communications Limited Partnership; Maricopa Media, Inc.; T.V. Broadcasters, Inc.; and LI-COM Limited Partnership ARE DENIED, and that the application of Hector Garcia Salvatierra, Limited Partnership (File No. BPCT-850215LB), IS GRANTED; and

44. IT IS FURTHER ORDERED, That Maricopa Media's motion for leave to file out of time filed on February 19, 1988; Tolleson Broadcasting's motion for leave to file notice three days late filed April 14, 1988; Tolleson Broadcasting's motion for leave to file supplements filed May 2, and 9, 1988; Aztec Broadcasting Corporation's and T.V. Broadcasting's motions for correction of transcript filed June 3, 1988; and LI-COM's motion to accept late filed transcript corrections filed June 9, 1988 ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTE

[1] The reference to Mike Parker and Associates brings to mind *Religious Broadcasting Network, supra*, 3 FCC Rcd at 4090, where the Board affirmed the presiding ALJ's finding that San Bernardino Broadcasting, whose real-party-in-interest was a Michael Parker, was entitled to no integration credit, the Board characterizing the application as a "travesty and a hoax." It is not clear from the record whether the Michael Parker in *Religious Broadcasting Network* is the same Mike Parker here, but we note that the *modusoper andi* is similar.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-206

In re Applications of

MARY FAYE GILBERT	File No. BPH-870526MA
BELLE CHASSE ENTERPRISES, INC.	File No. BPH-850526ME
SUNSETT BROADCASTING CO., L.P.	File No. BPH-870527MA
Randolph J. Callendar d/b/a FIRST BELLE CHASSE MEDIA GROUP, A Partnership in Commendam	File No. BPH-870527MB
AREA BELLE CHASSE COMMUNITY RADIO	File No. BPH-870527MC
BELLE CHASSE RADIO LIMITED PARTNERSHIP	File No. BPH-870527ME

For Construction Permit for a
New FM Station, Channel 275A, 102.9 MHz
Belle Chasse, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: October 18, 1988; Released: November 2, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN

1. Before the Board is an appeal filed by Area Belle Chasse Community Radio (ABC), pursuant to Section 1.301(a)(1) of the Commission's Rules, 47 C.F.R. §1.301(a)(1), from an *Order*, FCC 88M-2871, released September 1, 1988, of Administrative Law Judge Richard L. Sippel (ALJ) dismissing ABC's application from the captioned proceeding with prejudice.

2. The facts and circumstances leading to the ultimate dismissal of ABC's application are as follows: ABC's original application was filed on May 27, 1987, specifying a transmitter site (Site A), and containing a certification that this site was available to ABC. Pursuant to the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985) (new "window" processing rules) ABC would have been allowed to amend to perfect the filing of its application within 30 days from the release of the *Public Notice* announcing the tenderability of its application. Such a *Public Notice* in this proceeding was released on June 22, 1987. However, on November 13, 1987, ABC, acting without benefit of counsel, filed an amendment to its application proposing a new transmitter site (Site B) claiming solely that its amendment was filed "due to possible future complications using the previously proposed site".

3. Nearly six months later, on May 9, 1988, the *Hearing Designation Order* (HDO) in this proceeding was released (DA 88-609). Therein, the Chief, Audio Services Division, properly determined that ABC had not made the requisite "good cause" showing for the acceptance of its amendment (to Site B) pursuant to Section 73.3522(a)(6) of the Commission's Rules, 47 C.F.R. §73.3522(a)(6), in light of the fact that ABC had filed its amendment nearly four months after the closing of the date specified for perfecting its application. ABC's amendment was thus returned. However, at this point, ABC's Site A apparently remained intact and, because no determination had been issued by the Federal Aviation Administration (FAA) indicating that ABC's Site A would not be a hazard to air navigation, an appropriate "air hazard" issue was specified with respect to ABC.

4. Following release of the HDO on May 2, 1988, ABC renewed its attempt to amend its application designating Site B. On June 7, 1988, it filed a "Petition for Leave to Amend" with the ALJ. Therein, ABC claimed (Petition, para. 2, emphases added):

> As set forth in the Declaration of Sue Adams (Attachment B hereto), when it first prepared its application in May, 1987, ABC was advised that its originally proposed transmitter site would be available and suitable for use as a broadcast tower site. On that basis, ABC specified that site in its original application. However, several months after its application was filed, ABC *informally* learned that the owner of that site had since decided to develop the site in a manner inconsistent with ABC's proposed use. This planned development came to ABC's attention, in particular, through newspaper reports [which indicated that a residential area and golf course was planned]. Because it therefore *appeared* that its proposed site -- *although available and suitable, to the best of ABC's knowledge, at the time it proposed that site -- might become unsuitable* in the foreseeable future, ABC instructed its technical consultants to identify an alternate site which could be proposed as a substitute for its original site. Such a site was identified, ABC obtained reasonable assurance of the availability of that alternate site for use in its application, and an appropriate amendment reflecting the relocation was prepared and filed on November 13, 1987.

5. One of the competing applicants, Mary Faye Gilbert (Gilbert) filed an opposition to ABC's petition. Therein, Gilbert averred (Opposition, paras. 2-3, 6; emphasis added):

> It is interesting to note that at no time does ABC attempt to demonstrate by affidavit of the owner of the proposed site, Joseph R. Orgeron, that it was in fact suitable and available to ABC at the time it filed its application. Nor did ABC provide an affidavit from Mr. Orgeron that he had decided to develop this site in a manner inconsistent with ABC's

proposed use. Based upon information obtained by Gilbert, it appears that the reason for the absence of supporting affidavits from Mr. Orgeron is apparently due to the fact that ABC's site is not part of the proposed development for a residential/golf course and wilderness park. To verify this information, Gilbert contacted Lloyd D. Celentano, Deputy Researcher of Conveyenaces for the City of New Orleans, Office of Conveyances, Orleans Parish, who researched the Conveyance Office deeds and titles for the property in question which is called "Delecroix Plantation" owned by Joseph Orgeron. (*See* Attachment A). *Mr. Celentano attests to the fact that the tract of land is not involved nor is it near the land being proposed for a golf course and country club* . . . .

* * * * *

It is also significant to note that there is an air hazard issue on the proposed site. When Gilbert originally was looking for suitable transmitter sites, she did not propose the area owned by Mr. Orgeron because of the fact that it is located at the end of a runway from the Naval Air Station. Based upon conversations that she had with Claire Billington [of the FAA], she was advised that the FAA had requested ABC to provide it with a map of the area but that the FAA was advised to forget it because they were changing their site. [Footnote omitted] However, it is a clear presumption that the site itself was defective when ABC chose it from an FAA standpoint which could have easily been ascertained, as Gilbert did, before the application was filed.

6. Apparently accepting the unverified allegations of Gilbert (with respect to the FAA), and in spite of ABC's observation that its original site (Site A) remained available, the ALJ denied ABC's Petition for Leave to Amend, holding that ABC effectively had no site whatsoever available to it (*Memorandum Opinion and Order*, FCC 88M-2070, released July 1, 1988, at para. 6):

> The law is clear that when a party designates its site there must be a reasonable assurance of its availability. *Dutchess Communications Corporation*, 101 F.C.C. 2d 243 (1985). The facts indicate that a development plan was filed in 1986 which would have alerted ABC to the site's unavailability. Alternatively, there are facts presented indicating that the first site was not part of the land development plan and that it sat at the end of a runway of a military air station and FAA clearance could not be expected. Whichever factual scenario applies, ABC appears not to have had the requisite reasonable assurance. *See National Innovative Programming Network*, 2 F.C.C. Rcd 5641 (1987).

7. Thereafter, ABC filed a request for permission for leave to file an appeal. This was denied by the ALJ by *Order*, FCC 88M-2418, released July 27, 1988. Prior to the release of this *Order*, Gilbert had filed a motion to dismiss ABC's application. The ALJ granted this latter motion by *Order*, FCC 88M-2871, released September 1, 1988, based upon the assumption that ABC had no transmitter site available to it. The appeal at issue herein followed. In support of its appeal, ABC attaches the site certification from its original application, a statement from Joseph Orgeron, the site owner, affirming that Site A was and is still available, the statement of Sue Adams, president of ABC, setting forth the circumstances surrounding its attempt to amend to Site B including its belief that Site A was part of a planned redevelopment, and a letter from Clair Billington, FAA Air Specialist, indicating that an aeronautical study was never completed on the originally-proposed site because the FAA believed that site had been superseded by ABC's proposed amended site. ABC Appeal, Attachments A-D.

8. The Board will grant ABC's appeal and reinstate that applicant in this proceeding. It appears from the information now before us that the ALJ's dismissal of ABC may have been premature. In its original application (FCC Form 301, Section VII), in response to question 3, ABC certified that it had reasonable assurance from the owner of its proposed site (Site A), Joseph Orgeron, that the proposed site was available. Nowhere in the numerous subsequent pleadings, does ABC claim or disclose that Site A was not, or is not, available to it; it maintains only that the site *might* become unavailable in the future because of possible planned land development. Indeed, Gilbert actually bolsters ABC's position (*see* para. 5, *supra)* and states (Opposition, at para.3) that the Deputy Researcher of Conveyances for the City of New Orleans concludes from his investigation "that the land in question [ABC's Site A] has not been designated for any other use than farm land and that no requests have been made. . . for designation for the building of a golf course and condominiums." Furthermore, as noted above, ABC has furnished with its appeal a statement from the landowner confirming that Site A was and continues to be available to the applicant, and an explanation from its president that it only sought to amend to Site B because of its good faith but erroneous reliance on newspaper articles suggesting that Site A had become unsuitable. In sum, it appears that the ALJ may have been mistaken as to the continuing availability to the applicant of Site A and its willingness to specify that site.

9. Having made these preliminary observations, we believe it is now appropriate for the ALJ to revisit the ABC application and to determine whether ABC in fact has reasonable assurance that its originally chosen transmitter location (Site A) is available to it. In reviewing this question, the ALJ must consider the evident circumstance that the FAA has never completed an air hazard study of that site; therefore, at a minimum, the applicant will have to supplement the record in this respect in order to meet the already-designated air hazard issue. On the other hand, should the applicant not receive clearance from the FAA, and again seek to amend its application to specify Site B (or some other site), it will of course be required to satisfy the stringent "good cause" requirements for such an amendment, which, at this stage and with its aforenoted history, would be a considerable hurdle. *See California Broadcasting Corp.*, 90 FCC 2d 800, 809 (1982); *Belo Broadcasting Corp.*, 68 FCC 2d 1313 (1978); *Erwin O'Connor Broadcasting* Co., 22 FCC 2d 140 (Rev. Bd. 1970). In this regard the ALJ may specify site availability/suitability or other issues against ABC, as he deems appropriate.

10. ACCORDINGLY, IT IS ORDERED, That the Appeal of Area Belle Chasse Community Radio filed September 12, 1988, IS GRANTED and its application (File No. BPH-870527MC) IS REINSTATED in the above-captioned proceeding.

FEDERAL COMMUNICATION COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-155

In the Matter of

SILVER STAR COMMUNICATIONS-ALBANY, INC.

Licensee of Radio Stations WMJM and WFAV-FM

Order to Show Cause Why the Licenses of WMJM and WFAV-FM, Cordele, Georgia should not be revoked.

Appearances

Willie J. Nunnery, Esquire, on half of Silver Star Communications-Albany, Inc.; *Jerry Hermele*, Esquire, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: October 18, 1988; Released: November 2, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN. Board Member BLUMENTHAL:

1. This proceeding was designated for hearing by the Commission, following an investigation by its Mass Media Bureau, to determine: whether the broadcast licenses of Silver Star Communications-Albany, Inc. for radio Stations WMJM and WFAV-FM, Cordele, Georgia, should be revoked pursuant to Section 312(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §312(a)(2), for abuse of the Commission's "distress sale" policy; and, if not, whether Silver Star has willfully or repeatedly violated Section 310(d) of the Communications Act (unauthorized transfer of control), 47 U.S.C. §310(d), and should therefore be subject to a forfeiture of20,000.[1] *Order to Show Cause and Notice of Apparent Liability*, 104 FCC 2d 898 (1986) (hereinafter " *Revocation Order)*. By *Memorandum Opinion and Order*, FCC 87M-903, released April 24, 1987, presiding Administrative Law Judge Edward Luton (ALJ) added abuse of process issues against Silver Star concerning its alleged failures to respond to discovery requests and its filing of another application to upgrade the facilities of another station. (A complete listing of all the hearing issues is provided at paragraph 2, *infra*.) In an *Initial Decision* (*I.D.*), 3 FCC Rcd 1958, *Erratum*, 3 FCC Rcd 2512 (1988), the ALJ found that Silver Star willfully and repeatedly violated Section 310(d) and abused the "distress sale" policy by transferring *de facto* control of Stations WMJM and WFAV-FM (see Issue (c) in paragraph 2, *infra)*, assessed it a forfeiture of20,000, and found some abuse of process in its discovery responses, but found in Silver Star's favor on all the other hearing issues and ultimately concluded that Silver Star remains basically qualified to be a Commission licensee and that its Cordele licensees should not be revoked. The proceeding is now before the Review Board on exceptions filed by the Mass Media Bureau. Silver Star did not file exceptions or reply exceptions, but did participate in oral argument held before the Board. We have reviewed the *I.D.* in light of the exceptions, the oral argument held August 8, 1988, and our independent examination of the record. We adopt the ALJ's findings of fact and conclusions of law, except as modified herein, but reverse his ultimate conclusion and revoke Silver Star's licenses for Stations WMJM and WFAV-FM.

2. The *I.D.*, to which the Mass Media Bureau excepts in many particulars and, especially, in the result that permits Silver Star to retain the licenses of the two Cordele stations, considered the following six issues:

(a) To determine whether the principals of Silver Star abused the Commission's distress sale process in connection with the termination of the hearing proceeding and the Commission's related grant of assignment of license applications in MM Docket Nos. 83-47 through 83-49 (File Nos. BAL-831004GS; BAL-831004GT; BALH-831004GU and BALH-831004GV);

(b) To determine whether Silver Star, as applicant in BAL-831004GT and BAL[sic]-831004GU, complied with the provisions of Section 1.65 of the Commission's Rules by keeping the Commission advised of substantial and significant changes as required by Section 1.65 and, if not, the effect of such noncompliance on the Commission's distress sale process;

(c) To determine whether Silver Star, in violation of Section 310(d) of the Communications Act of 1934, as amended, transferred control of Stations WMJM and WFAV-FM without a finding by the Commission that the public interest, convenience and necessity would be served thereby and if so, whether such transfer further constituted an abuse of the Commission's distress sale policy;

(d) To determine, in light of the evidence adduced under the foregoing issues, whether Dr. John Robert E. Lee and other principals of Silver Star possess the requisite qualifications to be or to remain licensees of the captioned radio stations;

(e) To determine whether Silver Star has abused the Commission's processes by failing to respond fully to the Mass Media Bureau's discovery requests and the presiding judge's *Order*, and whether, in light of the evidence adduced, Silver Star has the requisite qualifications to remain a Commission licensee; and

(f) To determine whether Silver Star has abused the Commission's distress sale processes by filing an application to upgrade the facilities of Station WJIZ(FM), Albany, Georgia, in violation of the terms of the Commission's grant of the transfer of Stations WJIZ(FM), WMJM, WFAV(FM), and WTJH to Silver Star in 1984 and without providing information about the existing overlap or justification for the filing and, in light of the evidence adduced, whether Dr. John Robert E. Lee and other

> principals of Silver Star possess the requisite qualifications to be or remain licensees of WMJM and WFAV(FM).

I.D., at paras. 1-2. The ALJ found in favor of the licensee on Issues (a) and (b) because, in his view, the offenses embodied in those issues were not proved by "clear and convincing evidence," *id.*, at para 124 (citing *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240 (D.C. Cir. 1980)). He did find against the licensee on Issue (e) (the "discovery" issue), but held that its delicts here "were not so egregious as to require Silver Star's disqualification." *I. D.*, at para. 121. And, he found in favor of the licensee on Issue (f), holding that "there can be no meaningful prohibition against a citizen merely *asking* his government for desired relief." *Id.*, at para. 123 (emphasis in original). The Mass Media Bureau asserts decisional error in each of these conclusions, except for Issue (e).

3. As to Issue (c)(the unauthorized "transfer of control" issue), the ALJ found that although Silver Star had "willfully and repeatedly violated Section 310(d) of the Communications Act," *I.D.*, at para. 124, revocation was unwarranted under Issue (d) because of his view that the statutory violations were not "accompanied by a deliberate attempt to conceal . . . through misrepresentation." *Id.*, at 120 (citing *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023 (Rev. Bd. 1982); *Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981)). The ALJ therefore ordered Silver Star to pay a20,000 forfeiture under Issue (c). *I.D.*, para. 124. The Mass Media Bureau contends, however, that Silver Star's actions here - as with most other issues - were marked by deception sufficient to warrant revocation.

4. For its part, Silver Star has filed no exceptions whatever to the *I.D.*, and therefore any objections it might have lodged are waived. 47 CFR §1.277(a); *see also KFPW Broadcasting Co.*, 44 FCC 2d 310, 314 (1973); *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4100 (Rev. Bd. 1988); *St. Charles Broadcasting Co., Inc.*, 55 FCC 2d 399, 400 (Rev. Bd. 1975). Inasmuch as the licensee here has not objected to the ALJ's conclusion that it willfully and repeatedly violated 47 U.S.C. §310(d), we might otherwise consider only the Mass Media Bureau's exceptions which contend that the Section 310(d) violations, standing alone, compel license revocation. However, as discussed in our conclusions (*infra*, para. 60), it may be that the Commission might wish to consider an alternative remedy for the §310(d) violation; and, therefore, it behooves the Board to consider the Mass Media Bureau's exceptions to the findings and conclusions on the other four designated issues to determine whether - as the Bureau urges - license revocation is warranted for reasons above and beyond the (constructively) admitted willful violation of Section 310(d). We, accordingly, address the Mass Media Bureau's exceptions to the ALJ's findings and conclusions on the issues, *seriatim*, below, after a brief discussion of the background to this case (paras. 5-21) and of some preliminary legal questions that bear materially on our analysis of the record evidence attending each of the said issues (paras. 22-30).

BACKGROUND

5. The wellspring of this case was not the instant *Revocation Order* issued against Silver Star (and released April 17, 1986), but an action taken three years earlier wherein the Commission designated for license renewal hearing (on misrepresentation issues) four Georgia radio stations owned by James S. Rivers and other members of his family. *See Memorandum Opinion and Order*, 48 Fed Reg. 8585, published March 1, 1983. The four Georgia radio stations covered by that 1983 renewal hearing order were: WTJH(AM), East Point; WJIZ-FM, Albany; and WMJM(AM) and WFAV-FM, both located in Cordele, the latter two stations (officially licensed to Southeastern Broadcasting System, Inc., wholly owned by James Rivers and members of his family) being the specific targets of the instant revocation proceeding.

6. James Rivers, rather than suffering the contretemps of a renewal hearing on the four Georgia stations, opted to activate the ejection seat via a "distress sale" pursuant to policies set forth in *Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978); *Clarification of Distress Sale Policy*, 44 RR 2d 479 (1978). Under the extraordinary "distress sale" policy, a licensee facing a renewal or revocation hearing may elect, prior to the actual start of the hearing,[2] to seek to assign the license(s) to racial minority-owned parties, 68 FCC 2d at 983, at 75% of the appraised market value of the station(s). *Grayson Enterprises, Inc.*, 77 FCC 2d 156, 164 (1980).

7. Rivers' search for a racial minority buyer for his four endangered Georgia stations led him, through an employee of WJIZ-FM, Fred (Doc) Suttles, Jr., to Dr. John Robert E. Lee. Dr. Lee was no stranger to the Commission's "distress sale" policy, having been the beneficiary of that policy in his acquisition of two Texas television stations (one in Abilene, the other in Lubbock). *I.D.*, paras. 6-7. Dr. Lee also controls the licenses of two Columbus, Georgia radio stations, two Jacksonville, Florida radio stations, and he owns an interest in a Detroit, Michigan radio station. *Id.*, para. 7. However, the ALJ observed:

> Dr. Lee was primarily interested in purchasing WJIZ. By August 1983, he understood that WTJH and the Cordele stations could be sold soon after they were acquired, since the FCC did not require distress sale purchasers to hold onto their acquisitions for any minimum period of time (Tr. 99-100, 2354-56). Lee intended to sell those stations as quickly as possible.

Id., at para. 8.[3] Indeed, when Dr. Lee met James Rivers for the first time in August 1983, *id.*, para. 9, it appears that Rivers suggested his desire that his son Ronald, a minority shareholder in the Cordele stations, and Sara Howell, a Rivers employee since 1957 as well as a partner in a later relationship with James Rivers - according to Sara Howell - "[t]he exact details [of which] defy description . . . among reasonable and decent persons," *id.*, at para. 41,[4] become the ultimate owners of the Cordele stations. Dr. Lee, wishing to retain only WJIZ-FM, Albany, Georgia for Silver Star, and anxious to divest the Cordele (and East Point) stations as expeditiously as possible after his discount acquisition of all four facilities, was quite agreeable to an immediate resale of WMJM(AM) and WFAV-FM back to James Rivers' son Ronald and Sara Howell. Indicating that he too "would be willing to sanction whatever the FCC would sanction," *id.*, at para. 9

(quoting Tr. 86). Dr. Lee entered into an October 3, 1983 Memorandum of Intent, executed by James Rivers, in which Silver Star would give back a400,000 promissory note for the two Cordele stations, but that:

> It is also agreed that at Closing, Buyers will give an option to Ronald Rivers and Sara Howell, or a corporation of which they are or will be principals, to acquire the assets of stations WMJM(AM) and WFAV(FM), Cordele, Georgia, free and clear at Closing. The option terms shall be for a period of one (1) year from Closing between Buyers and Sellers and consideration will be assumption by Ms. Howell and Mr. Rivers of the promissory note, plus payment of accrued interest thereon. Appropriate leases and contracts will be assigned to Ms. Howell and Mr. Rivers. It is specifically understood that the final decision on whether to buy the station may be made by Mr. Rivers and/or Ms. Howell at any time until the one (1) year option expires by giving notice in writing at least five (5) working days prior to the expiration of the one (1) year option period to advise Sellers of their intent to exercise the option at the price indicated hereinabove.

Id., at para. 10 (quoting Mass Media Bureau Exh. 2).

8. So, on October 6, 1983, prior to the slated renewal hearings on the four Rivers' Georgia stations, James Rivers filed with the ALJ presiding in that earlier case a motion to permit a "distress sale" of the four imperiled stations to Silver Star. Accompanying that motion was the aforementioned Memorandum of Intent. However, at the Rivers' prehearing conference, the presiding ALJ properly balked at the terms of the Memorandum of Intent, declaiming that a resale of the two Cordele stations back to Ronald Rivers - a minority owner of those two stations at the time of the alleged misconduct -might simply restore the licenses to an individual potentially responsible, in whole or in part, for the misrepresentations that led to the Rivers renewal hearing in the first instance. *See DuPage County Broadcasting, Inc.*, 39 FCC 2d 885 (1973). Reacting to that ALJ caution, counsel for Rivers and Silver Star returned to a second prehearing conference, on October 13, 1983, and informed the ALJ that the offending Memorandum of Intent had been vacated. Submitted shortly thereafter to the renewal hearing ALJ was the joint affidavit of Ronald Rivers and Sara Howell, which declared:

> Ronald Rivers and Sara Howell . . . have no agreements, understandings, commitments, or similar arrangements, written or oral, whereby they will continue in any employment or other relationship with Silver Star Communications-Albany, Inc., should Silver Star become licensee of any of the stations being acquired by Silver Star from the Rivers family . . . .

Id., at para. 12 (quoting Mass Media Bureau Exh. 4). A cognate affidavit from Dr. Lee declared:

> John Robert E. Lee . . . has made no agreement, understanding, commitment, or other arrangement written or oral, whereby he has committed to continue any employment or other relationship with Silver Star . . . of Ronald Rivers or Sara Howell should Silver Star . . . become licensee of stations WJIZ-FM, Albany, WTJH, East Point, or WMJM/WFAV, Cordele . . . .

Id.

9. Based upon the foregoing representations, the ALJ, by *Order*, FCC 83M-4396, released November 29, 1983, granted James Rivers' motion to continue the license renewal hearing on the four Georgia radio stations so that Rivers might petition the full Commission to permit a "distress sale" of all four facilities to Silver Star. However, unknown to the ALJ at that time, Ronald Rivers and Sara Howell had retained independent counsel who advised counsel for James Rivers and Silver Star, respectively, that notwithstanding their joint affidavit, Ronald Rivers and Sara Howell would oppose any restrictions on employment or future licenseeship at the Cordele stations. Counsel for Ronald Rivers and Sara Howell also advised his counterparts that "I am not filing a formal appearance in the case because I do not believe . . . that it is wise to highlight the Ronald Rivers/Sara Howell situation" and that "[i]t is perfectly satisfactory . . . if the Commission makes no mention whatsoever of either of them." Mass Media Bureau Exh. 3. Indeed, it appears from the record that counsel for the Rivers and Howell had several meetings with Mass Media Bureau officials to determine whether the FCC would accept an immediate resale of the Cordele stations to Ronald Rivers and Sara Howell, or permit them an option to do so later, but the Bureau refused to "cut a deal." Tr. 2583-2584. *See also id.*, at 2590, 2604-2607, 2609, 2620-2622, 2693, 2695, 2703-2706, 2709, 2857-2858. In fact, the Mass Media Bureau demanded more information about the potential role of Ronald Rivers, so much so that counsel wrote on January 10, 1984 to the Rivers:

> I perceive it to be no more than a housekeeping matter, but it's obvious that they have suspicions as to future intentions. Having said that, I hope Ron and Sara will not panic in any way. The fact is, while there have been discussions of your future roles, no agreements have been reached . . . if they have suspicions that you may end up in a role at Cordele, maybe it's because they see it to be a logical kind of move for Bob Lee.

Mass Media Bureau Exh. 55. Still, at that point in time, there was no FCC requirement that Silver Star retain the four stations acquired from Rivers pursuant to the Commission's extraordinary "distress sale" policy for any minimum period of time whatsoever, a condition the Commission did not begin to rectify until nearly one year later in November, 1984 (*see supra* note 3); and, accordingly, Dr. Lee - even *before* he acquired the four Georgia stations - unabashedly evinced his intention to retain for Silver Star *only* WJIZ-FM, Albany, Georgia. As to the other three Rivers stations he was acquiring, Dr. Lee never denied his desire "to get rid of Cordele and East Point as quickly as I possibly can in a legitimate, legal manner," *I.D.*, at para. 13 (quoting Tr. 186), including mayhaps a quick resale of the Cordele stations back to Ronald Rivers "if the FCC would permit that to happen." *Id.*

10. On May 24, 1984, the Commission approved the "distress sale" of the four radio stations to Silver Star. *Id.*, para. 20. Needing additional time to arrange for financing, Silver Star did not close on the Rivers stations until November 30, 1984, *id.*, para. 115, at which time "Lee paid the Rivers1,727,000 for WJIZ and WJTH" and "executed a 'Promissory Note' to Southeastern Broadcasting in the amount of400,000 for the purchase of the Cordele stations." *Id.*, at para. 59. During the year between the ALJ's October 1983 suspension of the Rivers license renewal hearing and Silver Star's November 1984 formal acquisition of the four Georgia stations, the *dramatis personae* were engaged in a series of activities that constitute a salient of the record evidence against Silver Star, which activities (chronicled in subatomic detail in the *I. D.*) are summarized below.

11. First, in October 1983, Dr. Lee contacted Dr. Charles Finney, the sole owner of a fifth station, WJAZ(AM), also in Albany, Georgia, with a proposal to buy WJAZ(AM) to complement (rather than compete with) WJIZ-FM, which latter Dr. Lee was acquiring from Rivers, and the only Rivers station Dr. Lee intended to retain for very long. Dr. Lee agreed to purchase 75% of WJAZ(AM) from Dr. Finney, on the condition that Dr. Finney obtain a favorable long-term lease from James Rivers for the WJAZ(AM) transmitter site, a site Dr. Finney had been leasing from Rivers. *Id.*, para. 16. Dr. Finney's son, Fred Finney, prepared and presented to James Rivers a proposed site lease for WJAZ(AM). The draft lease included a clause that directly tied favorable lease terms for WJAZ(AM), Albany, with the resale of the two Cordele stations back to Ronald Rivers (and perhaps Sara Howell), to wit:

> 16. In the event that _____ and _____ have not received a bona fide offer to sell radio stations and _____ located in Cordele, Georgia, at a price not to exceed _____ Dollars () _____ by July 15, 1984, then and only in that event, James S. Rivers, Inc., shall have the right to terminate this agreement upon five (5) days written notice to Lessee (MMB Ex. 17, p.4).

Id., at para. 17 (quoting Mass Media Bureau Exh. 17). Fred Finney contended at hearing that the foregoing clause, intended as a "bargaining chip," was included at the behest of his father, with Dr. Lee's approval. *Id.*, para. 18. Dr. Finney has since become a principal of Silver Star.

12. Second, starting in January 1984, a Douglas M. Sutton, Jr., of Ty Ty, Georgia, contacted Silver Star with an eye toward purchasing the two Cordele facilities from Silver Star, once it had formally acquired those two stations from James Rivers. Sutton's contacts were initially with Fred (Doc) Suttles, the long-time WJIZ-FM employee who had introduced Dr. Lee to James Rivers. Sutton and Fred Suttles intermittently exchanged information about the stations, respective financial positions, *etc.*, throughout 1984. Though the two parties negotiated through 1984 and 1985, no sale of the Cordele stations from Silver Star to Sutton was accomplished; and Sutton's final offer, conveyed by letter of February 17, 1986, was not answered by Silver Star. *Id.*, paras. 19-25. While Silver Star did not reach an agreement with Sutton for the sale of the two Cordele stations, Dr. Lee did discuss the sale of WTJH(AM), East Point, Georgia - another station Silver Star would be acquiring from Rivers but (like the Cordele stations) did not want - with Bishop Levi Willis, such discussions commencing in October 1983. *Id.*, para. 27. Indeed, the ALJ records that, Dr. Finney - soon to be Dr. Lee's partner in WJAZ(AM), Albany, Georgia and a Silver Star principal - sent a letter to Dr. Lee on October 5, 1984, which stated:

> We must have a plan for the management of the Cordele property during the time that the FCC will be considering the transfer of that facility back to Mr. Rivers. We also need to be prepared to operate the Atlanta station until we can close with Mr. Willis.

Id., at para. 28 (quoting Mass Media Bureau Exhibit 8). Dr. Finney testified at hearing that, at the time he wrote that letter, he:

> viewed Bishop Willis as "our number one prospect" with respect to WTJH; he viewed Ronald Rivers to be in the same position with respect to the Cordele stations.

Id. (citing Tr. 2263-64).

13. Third, the record journalizes the intervening roles of William Goodson, an employee of Rivers' WMJM(AM) and WFAV-FM, Cordele, from 1958 to 1979, and Sara Howell, a bookkeeper at those same stations since 1957. Goodson testified that he left Rivers' employ after becoming aware of program log falsifications on the 1978 renewal application of WTJH-FM, East Point; and in 1981 he filed a complaint based thereon with the FCC, after being stoutly beaten by assailants he believes were hired by James Rivers. *Id.*, para. 31. Goodson now owns a cable television station in Cordele. Sara Howell, Goodson's colleague at the Cordele stations since the 1960's, claimed to be the equitable owner of 30 of the 100 shares of Southeastern Broadcasting System, Inc. (Rivers' corporate licensee of the Cordele stations), a 30% share she claimed was gifted to her in 1972 by James Rivers in consideration of "his 'very warm' and 'intimate relationship' with Howell." *Id.*, at para. 32 (quoting Tr. 779). Howell left the Cordele stations in April 1984, at which time Rivers' petition to permit a "distress sale" of his four Georgia stations to Silver Star was pending before the FCC.

14. In that same month (April 1984), it is asserted by Goodson that he received a telephone call from Dr. Lee, *id.*, para. 36 (a telephone call Dr. Lee does not necessarily deny making, *see id.*, paras. 51-52), indicating Silver Star's imminent acquisition of the Cordele stations and inquiring if Goodson might examine WJIZ-FM, Albany, to assess the technical quality of that station. It was in that very first conversation (of April 12, 1984), averred Goodson at hearing, that Dr. Lee apprised Goodson of something "very confidential":

> The confidential information is said by Goodson to have been this: there should be no concern with the Cordele stations or the East Point station since Lee thought he already had a buyer for East Point and, with respect to Cordele, "[Lee] had agreed to give the Cordele stations back to Ron Rivers and Sara

> Howell as part of the package deal" (Tr. 2046-47). According to Goodson, Lee stated that he had to agree to "give" the Cordele stations back to Ronald Rivers and Sara Howell under threat of Mr. Rivers finding another buyer who would turn those stations back to Ronald Rivers and Sara Howell.

Id., at para. 36. Goodson contended at hearing that telephone conversations with Dr. Lee and/or Fred (Doc) Suttles continued for several months, through the summer of 1984, and that Dr. Lee many times reaffirmed his intent to reassign the two Cordele stations back to Ronald Rivers as soon as possible. *Id.*, paras. 37-47. (Here, it is recalled that the Commission did not impose any minimum retention period for stations acquired pursuant to a "distress sale" until sometime after November 8, 1984. *see supra* note 3.) Though Goodson alleged that Dr. Lee's initial conversations focused on the technical quality of WJIZ-FM, Albany, Goodson also contended that, starting on or about April 16, 1984, Dr. Lee and Suttles began inquiring if Goodson had communicated with his erstwhile colleague, Sara Howell, ultimately explaining of their concern that Howell might attempt to derail the Rivers/Silver Star transaction so as to protect her putative 30% interest in the two Cordele stations. *Id.*, paras. 39, 40, 54-57. Notwithstanding, and as noted above, the Commission approved the "distress sale" of the four Rivers stations on May 24, 1984, allowing the parties 90 days to close on the sale. As will be detailed *infra*, Silver Star was unable to close within that 90-day deadline, and was compelled to seek an extension of time for the formal transfer. The legal closing on the four Rivers stations did not occur until November 30, 1984.

15. Although Goodson initially advised Dr. Lee that he had not heard from the potentially troublesome Sara Howell since 1979, when he left Rivers' employ, Goodson claims that he met with Howell on the weekend prior to June 11, 1984. And, thereafter, at Dr. Lee's express instruction - says Goodson - Goodson drafted a "Mutual Recognition and Agreement" to be signed by Dr. Lee and Sara Howell, the "recognition" portion declaring:

> Sara J. Howell was employed by Southeastern Broadcasting System, Inc., from 1957 through April 13, 1984 (approximately 27 years). During the major part of that employment period, she served as Secretary- Treasurer of the corporation. Her letter of resignation was submitted on April 13, 1984, and the reason given was unjustified harassment from the owner. The exact details of that harassment defy description in a legal document among reasonable and decent persons, but exist in writing if needed for filing with FCC or other legal body . . . .
>
> Mrs. Sara J. Howell Brown states that during the last several months (and in particular the last several *weeks)* of her employment by Southeastern Broadcasting System, Inc., she was victimized in a fashion to which only a female can be victimized, and subjected to the most degrading form of abuse and harassment, at the hands of her employer. She contends she has in her possession written documents which will prove this unbearable abuse beyond a shadow of a doubt . . . . She further contends that this harassment was purposely and deliberately conceived, contrived, created and concocted by the majority stockholder of Southeastern Broadcasting System, Inc., for the wrongful purpose of forcing her resignation and denying to her a rightful share (30%) in the interest, principal and other benefits to be derived from the sale of the radio stations WMJM & WFAV.

Id., at para. 41 (quoting Mass Media Bureau Exh. 9). The "agreement" portion declared:

> A. Sara Howell Brown will file no action with the FCC and take no action through any other legal body until the action approved by the FCC has been executed--provided, however, that the approved sale be diligently pursued and carried out in the period specified by the FCC, or within a reasonable period thereafter.
>
> B. Dr. John Robert E. Lee agrees that in the event he should elect to resell either or both of the Radio Stations WMJM and WFAV, to any party, he will not do so without taking every step to insure the 30% interest of Mrs. Sara J. Howell is satisfied, and he understands that should he fail to do so, Sara Howell would still retain the right to take the legal action she would have otherwise taken earlier, and he accepts the fact that she fully intends to take such actions only if her interest is in jeopardy, such action being void of malice toward Dr. John Robert E. Lee. (quoting Mass Media Bureau Exh. 9).

Id. In consideration for Dr. Lee's acceptance of these terms, Sara Howell would forbear from (1) filing against the pending "distress sale" with the FCC; (2) seeking injunctive action against the Rivers/Silver Star transaction with the Crisp County Superior Court; or (3) filing a complaint with the federal EEOC. *Id.* Under the following cover letter of June 17, 1984, Goodson forwarded the above-reproduced agreement to Dr. Lee for signature:

> I have gone over the matters which you, I and Doc Suttles recently discussed at length with Sara Howell (Brown). Altogether I have seen with my own eyes documentation of treatment which Ms. Howell endured, so cruel and wicked that it defies description among gentlemen. But I assure that her resignation is very real and this is no trick. I am now totally convinced. I also believe with all my heart that if Mrs. Howell chose to file this information with any legal body, there would be no sale of any kind--not because of any shortfall on your part or anyone else's save the one in question . . . .
>
> The subject of this letter knows the personality of Mrs. Howell. He knows she would never stand still after being subjected to such abuse and wicked treatment. There is not one iota of doubt in my mind, or in the mind of Mrs. Howell, that he fully intends for her to file a petition with the FCC or an injunction in superior court. This would allow him to hold onto the stations for another year or so and would discourage you as a purchaser.
>
> Therefore, I am glad to inform you that all agree that Mrs. Howell will take no action which will play into his hands and work against your best interest.

> As for myself, I certainly intend to take no such action, as my interest has always been with whatever Doc Suttles wants.

Id., at para. 42 (quoting Mass Media Bureau Exh. 9). However, according to Goodson, Dr. Lee declined to sign the "Mutual Recognition and Agreement" on advice of counsel, *id.*, para. 44, (a claim with which Dr. Lee agreed, *see id.*, para. 55); but that Dr. Lee orally committed to himself honoring the "spirit" of the agreement, a commitment Dr. Lee reaffirmed - says Goodson - even after the sale closing in a telephone conversation of December 2, 1984. *See id.*, paras. 44-46.

16. Despite Dr. Lee's alleged oral *assumpsit on quantum meruit* of Sara Howell's claim to a 30% interest in the two Cordele stations, Howell was not mollified. On September 11, 1984 - and again with the assistance of Goodson - Sara Howell triggered both barrels. One, she filed a sexual harassment complaint against James Rivers with the Atlanta Regional Office of the EEOC, the prayer for relief of which read as follows:

> A. That Southeastern Broadcasting System, Inc., be ordered to pay me a sum of money equal to the full salary that I would have earned from April 13, 1984, up to the date that the stations are actually transferred to a new owner.
>
> B. That Southeastern Broadcasting System, Inc., be ordered to disburse to me 30% of the sale price of WMJM/WFAV (sale price400,000--my share120,000) plus 30% of all interest which Southeastern may receive on the400,000. Plus, I petition that they be ordered to pay me 14% interest on my 120,000 from the date the station sale is finally closed up to the date on which they disburse to me my legal share, and that they be ordered to disclose to me fully the disposition of the Certificates of Deposit in which I have a rightful 30% share.

Id., at para. 34 (quoting Mass Media Bureau Exh. 10). Two, Howell on that same date opposed the Rivers/Silver Star request for an extension of the 90-day closing deadline prescribed when the Commission approved the "distress sale" on May 24, 1984, and she filed with the FCC a pleading styled "Petition to Deny Additional Time to Radio Stations WTJH, East Point, Georgia; WMJM & WFAV, Cordele, Georgia; and WJIZ, Albany, Georgia; and Petition to Order a Stipulation in the Distress Sale Contract of WMJM/WFAV to Protect the Interest of Female Stockholder, due to EEOC violations." *Id.* Sometime in October 1984, Sara Howell began work as a bookkeeper and salesperson at Goodson's cable station in Cordele. *Id.*, para. 33.

17. Third, just three weeks before James Rivers and Silver Star closed on the four Georgia stations, the FCC, on November 8, 1984, adopted a new policy which required, *inter alia*, that a party acquiring a broadcast license through a "distress sale" retain that facility for a minimum period of at least one year. *See supra* note 3.[5] The Commission's policy change mandating what former Secretary of State Henry Kissinger might have termed a "decent interval"[6] between the "distress sale" acquisition of a broadcast station (at 75% of market value), and a higher price resale of that same facility to a new licensee, scotched Dr. Lee's plans to "flip" the unwanted Cordele stations immediately upon acquisition. By dint of the Commission's revision of its "distress sale" policy, Silver Star was now mandated to own and operate all four Rivers stations for one year (*but see supra* note 5).

18. Regardless of Silver Star's untimely regulatory obligation to operate all four Georgia stations for one year after acquisition, and howbeit Dr. Finney's letter caveat of October 5, 1984 to Dr. Lee that "[w]e must have a plan for the management of the Cordele property during the time that the FCC will be considering the transfer of that facility back to Mr. Rivers," Silver Star did virtually nothing to assume control over the Cordele stations upon acquisition in November 1984. Whereas Fred Finney (son of Dr. Charles Finney, Dr. Lee's anticipated partner in WJAZ(AM))[7] was nominally appointed general manager of the four Rivers' stations, including the two Cordele outlets, the record is uncontrovertible that Ronald Rivers, who remained in stasis after Silver Star's acquisition (pursuant to an employment contract executed at the sale closing, *I.D.*, para. 61), retained *de facto* control over the Cordele stations.

19. The record demonstrating that Ronald Rivers, and not Silver Star, controlled the Cordele stations after November 30, 1984 is synopsized as follows: (1) Silver Star provided absolutely no start-up funds for the Cordele stations, such start-up funds (approximately10,000) being provided exclusively by Ronald Rivers through monies obtained from the Cordele Banking Company and underwritten by Ronald Rivers personally (*id.*, paras. 65-69)[8]; (2) Ronald Rivers consistently paid himself a salary in excess of his contract with Silver Star, paid many of his personal expenses (*e.g.*, "electricity, telephone, gas and water for his home, electricity for his boat dock," *etc.*) with station funds (*id.*, para. 79), but neither the rent checks to James Rivers nor the initial (30,000) payment on the400,000 note were cashed (*id.*, paras. 82, 84); (3) Dr. Lee evinced an unimaginable disinterest in the source of funds for Cordele station operation and the disbursement of such funds (*id.*, paras. 74, 76-77, 83); and (4) from December 24, 1984, through March 6, 1985, Ronald Rivers sent Fred Finney only five letters reporting on the Cordele stations, but even these occasional written reports stopped after that date (*id.*, para. 75). (*Note:* We need not dwell on this aspect of the record since Silver Star has not excepted to the ALJ's conclusion that it willfully violated Section 310(d) of the Communications Act by its failure to assume control over the Cordele stations. In brief, and as the Commission has stated, the ability to set "policies as to finances, personnel policy and actions, or programming . . . are the three most important factors in determining control." *News International, PLC*, 97 FCC 2d 349, 358 (1984)(citing *Stereo Broadcasters, supra)*. Thus, the findings of fact reflected in paras. 64-85 of the *I.D.*, which Silver Star does not here challenge, provide irrefragable evidence that Ronald Rivers, not Silver Star, maintained complete dominion over the two facilities from the time Silver Star acquired the stations in November 1984 until June 4, 1986, more than a year after the Commission commenced its fruitful investigation of Silver Star.)

20. Early in 1985, as we have observed, the Mass Media Bureau began its investigation of the Cordele stations. *Id.*, paras. 63, 70. Just prior to that time, however, Dr. Lee,

Dr. Finney and Fred Finney were again at work trying to secure a favorable lease on WJAZ(AM) from James Rivers. The ALJ records:

> On January 11, 1985, Lee's attorney drafted an agreement embodying these concepts. The draft provided that James Rivers, Inc., and Dr. Finney (who still owned WJAZ at the time) would enter into a lease concerning the real property at WJAZ; Silver Star granted Rivers, Inc., a one-year option to purchase the Cordele stations at a purchase price of400,000 (MMB Ex. 13). The proposal was put to James and Ronald Rivers in January 1985. The Rivers took the position that the better procedure would be to separate the provisions having to do with the WJAZ lease and the provisions granting the option to Rivers, Inc., for the Cordele stations . . . .

Id., at para. 62 (quoting Tr. 1925-27, 2278-79; Mass Media Bureau Exh. 19). Thus:

> Separate proposed agreements were then drafted. Ronald Rivers rejected the proposed option agreement because it provided for Silver Star to retain the accounts receivables for the Cordele stations (Tr. 1665-67, 1923). The early 1985 Bureau investigation of the Cordele stations, however, ended the negotiations between Ronald Rivers and Silver Star regarding the option (Tr. 1168). In early 1986, after the December 30, 1985, transfer of WJAZ from Dr. Charles Finney to Silver Star Communications, James Rivers granted a long-term lease on the WJAZ tower site (Tr. 2290).

Id., at para. 63.

21. Based on the Mass Media Bureau's investigation, the licenses of the Cordele stations were set for a revocation hearing on April 17, 1986. *Revocation Order*. Silver Star's efforts at the hearing were as detached as its efforts at the Cordele stations, for although "[t]he Bureau's case consisted of 71 written direct exhibits and the testimony of 17 witnesses . . . Silver Star produced a single, one-page written exhibit and no witnesses."[9] Moreover, at the discovery phase of the hearing, Silver Star failed to provide many relevant documents and either failed to answer numerous interrogatories or filed incomplete and/or misleading answers to many such inquiries. *I.D.*, paras. 86-91. Finally, despite the fact that the *I.D.* held that "Silver Star willfully and repeatedly violated Section 310(d) of the Communications Act (Issue (c)) by transferring *de facto* control of Stations WMJM and WFAV-FM, and abusing the Commission's distress sale policy," *id.*, at para. 124, Silver Star filed no exceptions whatever to the *I.D.* The Mass Media Bureau, as noted, has done so aplenty, and we hereinbelow review those exceptions, after we discuss some preliminary analytical standards.

STANDARD OF PROOF

22. As also noted at the outset (*see supra* para. 2), the ALJ surveyed the record evidence and held that the Mass Media Bureau had not proved violations of Issue (a)(the "distress sale" abuse issue) or Issue (b)(the Section 1.65 "reporting" issue) by "clear and convincing" evidence. *Id.*, para. 124. Nevertheless, and apparently utilizing the same "clear and convincing" standard, the ALJ simultaneously held that "Silver Star willfully and repeatedly violated Section 310(d) of the Communications Act (Issue (c)) by transferring *de facto* control of Stations WMJM and WFAV-FM, *and abusing the Commission's distress sale policy*. " *Id.* (emphasis added).[10,11] In applying a "clear and convincing" standard of proof, the ALJ cited *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240 (D.C. Cir. 1980). The Mass Media Bureau accepted the ALJ's use of the "clear and convincing" standard,[12] differing only on whether the Bureau had met that elevated standard. Inasmuch as the Bureau has not excepted to the "clear and convincing" standard and, for its part, Silver Star has not excepted to the *I.D.* in any respect, including the ALJ's adverse conclusions under Issue (c), we might avoid entirely a discussion of the evidentiary standard utilized here, and move on to the substantive exceptions and the remedy. However, there are currently pending before the Commission's ALJs other revocation cases; and because the Board finds that the proper standard of proof in such cases is the "preponderance of evidence" standard, and not the "clear and convincing" standard applied in this case, it is useful to review the law on this preliminary matter.

23. Our analysis begins where the ALJ and the Mass Media Bureau leave off: with *Sea Island Broadcasting Corp.* In that case, the late Judge Leventhal, writing for the court, assayed critically an earlier FCC license revocation case where the Commission had used a "preponderance of evidence" standard. In so doing, Judge Leventhal invoked *Collins Security Corp. v. SEC*, 562 F.2d 820 (D.C. Cir. 1977), where the D.C. Circuit had held that when an administrative agency makes a charge akin to fraud, and when the penalty (loss of a license to conduct business) amounts to a deprivation of livelihood, a "clear and convincing" standard of proof must be used by the agency.[13] However, very shortly after the court rendered *Sea Island*, the Supreme Court granted certiorari in *Steadman v. SEC*, 450 U.S. 91 (1981), to review the Fifth Circuit's affirmation of the SEC's use of the lower "preponderance of evidence" standard. Noting the conflict with the D.C. Circuit in cases such as *Collins*, 450 U.S. at 95, the High Court conducted an inordinately exhaustive exhumation of the legislative history of the Administrative Procedure Act's standard of proof; and it held resoundingly that Congress, in 5 U.S.C. §556(d), had purposefully prescribed the standard to be used in all adjudications conducted pursuant to 5 U.S.C. §554.[14] The High Court held:

> The language and legislative history of §7(c) [of the APA, codified 5 U.S.C. §556(d)] lead us to conclude, therefore, that §7(c) was intended to establish a standard of proof and that the standard adopted is the traditional preponderance-of- the-evidence standard.

450 U.S. at 102 (footnote omitted). *See also id.*, n.21 (citing *Sea Island* acknowledgement that "[t]he use of the 'preponderance of evidence' standard is the traditional standard in civil and administrative proceedings. It is the one contemplated by the APA, 5 U.S.C. §556(d)). To the extent that *Steadman* implicitly overruled *Collins*, the rationale undergirding the D.C. Circuit's *Sea Island* require-

ment of the "clear and convincing" standard in cases conducted under 5 U.S.C. §556 also vanished, and rather emphatically so.

24. No sooner had the Supreme Court decided *Steadman*, than this Review Board was confronted with a license aspirant urging the application of a "clear and convincing" standard on a misrepresentation issue. Citing *Steadman*, the Board rejected that plea, *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1136 (Rev. Bd. 1982), and it has many times reaffirmed that the standard of proof to be applied in traditional agency adjudications is the "preponderance of evidence" standard. *Peoples Broadcasting Corp.*, 92 FCC 2d 1303, 1315 (Rev. Bd. 1983), *review denied*, FCC 83-594, released December 15, 1983; *Mid - Ohio Communications, Inc.*, 104 FCC 2d 572, 600 (Rev. Bd. 1986).[15] The matter would thus appear to have been settled and the argument dormant until, in *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392 (D.C. Cir. 1985), the court took note of the fact that the Commission had held a petitioner to deny to proving a licensee misrepresentation by "clear, precise and indubitable" evidence. *Id.*, at 396 & n.1[16] Because that petitioner, on appeal, had not challenged that "higher-than-usual standard," (former) Circuit Judge Scalia "assume[d], without deciding, that it is valid," *id.*, but the Judge did in that same footnote " *Cf.* " to *Steadman*. Whatever door to a higher standard of proof Judge Scalia might have prised in his *Citizens for Jazz* footnote, the Commission seems swiftly to have closed it when the case was before it again on remand from the court. Noting Judge Scalia's higher note, the Commission itself noted responsively -- that "[t]he Court is correct that ordinarily the burden at hearing is satisfied by a preponderance of the evidence." *Riverside Broadcasting Company, Inc.*, 104 FCC 2d 644, 647 n.2 (1986).[17] *See also TeleSTAR, Inc.*, 2 FCC Rcd 7352, 7353 (1987) (citing *Steadman*). In contrapuntal triad, the Board joins the Commission "down by the *Riverside*, " and finds that inasmuch as nothing in the instant *Revocation Order* marks this as anything other than an ordinary revocation hearing under 47 U.S.C. §312, the appropriate standard of proof is, per *Steadman*, set out in 5 U.S.C. §556(d), with the burdens of proceeding and proof, of course, on the Commission. Giving all due respect to the Mass Media Bureau, we will heed the Supreme Court and recognize the evidentiary standard legislated by Congress.[18]

25. Notwithstanding the foregoing, we will not apply the lower (albeit correct) standard of proof in this case, for reasons similar to those intimated by Judge Scalia in *Citizens for Jazz*. Primarily, the Mass Media Bureau - which bore the dual burdens of proceeding with the evidence and of ultimate proof - did not except to (nay, supports) the ALJ's use of the "clear and convincing" standard; and, in fact, Silver Star asserts that it materially relied upon the Bureau's assumption of these heavy burdens and unusually high standard to present virtually no exculpatory evidence of its own (*see supra* para. 21 (Silver Star produced a single, one-page written exhibit and no witnesses)).[19] Furthermore, in view of the fact that we agree with the Mass Media Bureau that "clear and convincing" evidence does support the conclusion of significant offenses in this case, we find no need to remand this case to the ALJ for complete retrial under the proper standard of proof. *Cf. Sea Island.*

MISREPRESENTATION AND LACK OF CANDOR

26. Although neither the Commission nor the ALJ designated discrete misrepresentation issue or a lack of candor issue (*see supra* para. 2), and the Mass Media Bureau made no motion to have the ALJ add either such issue, the Bureau's exceptions are pregnant with charges of "active concealment" of facts during hearing, "lack of candor," and false testimony on the part of Dr. Lee.[20] At oral argument, Bureau counsel acknowledged that no specific issues relating to misrepresentation or lack of candor were present in this case, but counsel contended that no such particularized inquiries are necessary because "[t]he licensee's truthfulness and honesty and representations to this agency are always at issue in this proceeding."[21] The law, however, is otherwise in vital respects, and we briefly expound that law by way of explaining that the Board cannot honor the Bureau's exceptions insofar as they, here and now, seek a conclusion of intentional misrepresentation or disqualifying lack of candor.

27. As elucidated at length in *Fox River Broadcasting, supra*, 88 FCC 2d at 1133-1138,[22] misrepresentation and lack of candor are consanguineously related offenses directed to a licensee's truthfulness in dealing with the Commission, though each have different roots and purposes. Misrepresentation is an intentional misstatement of fact intended to deceive, which the Commission has likened to perjury and which, if committed before the FCC, could subject the perpetrator to criminal prosecution under 18 U.S.C. §1001.[23] Our own lack of candor offense, as we rehearsed in *Fox River*, arises from the special duty imposed upon FCC licensees and applicants to go beyond merely avoiding an affirmative misrepresentation, but to be fully forthcoming as to all facts and information relevant to a matter before the FCC, whether or not such information is particularly elicited. As the court recognized in *RKO General, Inc. v. FCC*, 670 F.2d 215, 229-230, 232 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982), this latter duty of complete candor is codified in our rules, 47 CFR §1.65, although criminal prosecution is not prescribed for that administrative offense. As goes the old adage, "you cannot be hung for what you don't say," but one might suffer greatly because either misrepresentation or lack of candor can lead to disqualification for an FCC license, if intent to deceive is proven. The Board has disqualified numerous applicants for such offenses. *See, e.g., KQED, Inc.*, 3 FCC Rcd 2821 (Rev. Bd. 1988); *Mid - Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986); *George E. Cameron, Jr. Communications*, 91 FCC 2d 870, 882-884, 893-896 (Rev. Bd. 1982), *on reconsideration*, 93 FCC 2d 789, 801-802, 803-812 (Rev. Bd. 1983)(subsequent history omitted). It has even suggested referral to the Department of Justice for possible prosecution where infamous misrepresentations have occurred. *California Broadcasting Corp.*, 2 FCC Rcd 4175, 4185 & n.23 (1987).

28. However, the courts and the Commission have treated these two generically related offenses somewhat differently insofar as the requirement for the designation of a specific hearing issue. Thus, in *RKO General, supra*, the court reversed the FCC's findings of misrepresentation on the part of the licensee, 670 F.2d at 225-226, but it upheld the Commission's disqualification of the licensee for lack of candor - despite the absence of a specific hearing issue - where the lack of candor was held to be so glaring as to amount to open contempt of the forum. *Id.*, at 228-236.

This slightly disparate treatment is evident also in *West Coast Media, Inc.* v. FCC, 695 F.2d 617 (D.C. Cir. 1982), where the court affirmed the Commission's refusal to renew a broadcast license for the licensee's failure to perform as promised, but faulted the Commission for finding an intent to deceive in the absence of a designated misrepresentation issue. Id., at 620 (intent to deceive . . . should not be discussed by the Commission in the absence of a designated misrepresentation issue). This Board has heeded the *West Coast Media* court's injunction. *See, e.g., Tequesta Television, Inc.*, 2 FCC Rcd 7324, 7325 (Rev. Bd. 1987)(At minimum, an appropriate disqualifying issue must first be designated, and at maximum, an intent to deceive, which lies at the core of all misrepresentation-like issues, must be proven); accord, *Signal Ministries, Inc.*, 104 FCC 2d 1481, 1488 (Rev. Bd. 1986), review denied, 2 FCC Rcd 1259 (1987), *aff'd per judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988); *Cannon Communications Corp.*, 101 FCC 2d 169, 174 n.10 (Rev. Bd. 1985), *review denied*, FCC 86-244, released May 15, 1986 (subsequent history omitted); *Focus Television Co.*, 98 FCC 2d 546, 551 n.10 (Rev. Bd. 1984), *modified on other grounds sub nom. Kannapolis Television Co.*, 1 FCC Rcd 1037 (1986); *Intercontinental Radio, Inc.*, 98 FCC 2d 608, 640 n.96 (Rev. Bd. 1984), *modified on other grounds*, 100 FCC 2d 817 (1985).

29. In some contrast, and consistent with the Commission's holding in *William M. Rogers*, 92 FCC 2d 187, 199 (1982), that "[t]he issue of candor need not be separately designated for hearing since the Commission has a right to expect candor from all of its licensees," the Board has held "that an applicant may be disqualified on the basis of its principals' candorless testimony when the lack of candor occurs 'before the judge's own eyes.'" *Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 719 (Rev. Bd. 1983)(quoting *RKO General*, 670 F.2d at 234), *recon. denied*, 96 FCC 2d 551 (Rev. Bd. 1984)(subsequent history omitted). The Review Board was, and is, cognizant of the fact that the Commission's decision in *William M. Rogers* was released (approximately 1 month) prior to the court's issuance of *West Coast Media* (demanding separate issue on charges of misrepresentation). Yet, so far as the Board is aware, *RKO General* remains "good law" as well, and the Board has sought to keep faith with both the *West Coast Media* principle, on the one hand, and the *William M. Rogers/RKO General* precedent, on the other hand, by assuring that any conclusion of lack of candor arrived at without the designation of a specific issue be so blatant as to make any further evidentiary hearing on the matter of candor obviously superfluous, within the court's purport in *RKO General*. This will be a rare case, indeed. *See, e.g., Peoples Broadcasting Corp., supra*, 92 FCC 2d at 1312 & n.16.[24]

30. In the case at bar, the ALJ found no lack of candor so patent and egregious as to amount to constructive contempt of the forum, within the meaning of RKO General. Neither did he add a separate misrepresentation issue, nor was he petitioned to do so. As a matter of law, then, we cannot accept the Mass Media Bureau's call to find Silver Star's principals guilty of misrepresentation or lack of candor. *Compare Order To Show Cause* (Black Television Workshop of Los Angeles, Inc.), FCC 88-280, released September 12, 1988 (revocation Hearing Designation Order on §310(d) issue; separate misrepresentation and lack of candor issues designated). It could be that the Mass Media Bureau has surely felt deceived by certain of Silver Star's actions, but proving an int ent to deceive calls for something else again. *See West Coast Media.* Still, as is suggested *infra*, we believe that the evidence compiled under the "distress sale" abuse issue does raise significant and material questions of fact as to whether Dr. Lee has intentionally misrepresented his relevant relationship to, and understanding with, Ronald Rivers at the pertinent times, or otherwise lacked candor at hearing. But for the fact that we sustain the Bureau on two organic offenses expressly at issue, the Board would be inclined to remand this case, *sua sponte*, on appropriate misrepresentation and/or lack of candor issues. *See, e.g., Dutchess Communications Corp.*, 101 FCC 2d 243, 254 n. 31 (Rev. Bd. 1985)(disqualification on other grounds negates need for remand on misrepresentation issue).

ISSUE (a): ABUSE OF "DISTRESS SALE" PROCESS

31. The Mass Media Bureau's case under this issue devolved from its theory that, despite the written representations of Dr. Lee and Ronald Rivers (and Sara Howell) to the Commission that Silver Star's acquisition of the Cordele stations was not entailed by a reverter interest to Ronald Rivers (and Howell) at the identical discount acquisition price, and as soon as possible after the Commission approved the "distress sale," there nonetheless endured an *entente Cordele* between Dr. Lee and Rivers to accomplish the selfsame result. In seeking to prove the existence of a "secret agreement" between the parties, the Bureau presented both direct and circumstantial evidence, but the ALJ reviewed that evidence, *I. D.*, paras. 99-113, and concluded that "the available evidence does not show the existence of any 'secret agreement.'" *Id.*, at para. 99. While the Board believes that the presence or absence of any such "secret agreement" is not crucial to the resolution of this particular issue, we review the Bureau's exceptions on this matter to illuminate the law on several evidentiary matters, for future guidance.

32. *Direct Evidence.* The chief element of direct evidence for the proposition that there existed an unwritten agreement between Silver Star and the Rivers clan to resell the Cordele stations to Ronald Rivers as soon as possible after the "distress sale" is said by the Mass Media Bureau to be the testimony of William Goodson. Goodson testified that Dr. Lee personally confided, several times over the telephone, that Silver Star had a standing agreement to turn the stations back to Ronald Rivers. *Id.*, paras. 36-38. Dr. Lee does not deny having had many conversations with Goodson, *see id.*, paras. 52-56, nor - in what is the essence of Silver Star's defense on the "secret agreement" aspect - does Dr. Lee deny telling Goodson, or anyone else for that matter, that he would have been amenable to selling the stations back to Ronald Rivers if the FCC would approve the sale, *see, e.g.*, Tr. 183-184, but that Dr. Lee had no firm agreement with Rivers to do so after the October 1983 option was annulled. *See id.* The thrust of Dr. Lee's testimony on this point was:

> Ron Rivers was considered as a potential buyer, like several other interested people who came who I have on record who are part of the record as potential buyer for the Cordele stations; yes. So they were among the potential buyers.

Id., at 186-187.

33. The ALJ did not credit Goodson's testimony, finding it inherently incredible that "[Dr.] Lee volunteered such information to him, a total stranger, in their very first conversation (and subsequently)," *I.D.*, at para. 113; that Goodson's testimony was motivated, in part, by an animus toward the Rivers, *id.* ; and that Goodson's recollections of his telephone conversations were "astonishingly precise" as to dates and substance. *Id.*, para. 112. The Mass Media Bureau's exceptions attack the ALJ's credibility findings, and particularly assert that Goodson's precision was a function of the fact that Goodson had maintained tapes and transcripts of most of his conversations with Dr. Lee.

34. The Bureau's exceptions do recognize that, in reviewing an ALJ's credibility findings, the Commission accords great deference. This Review Board has many times recognized the continuing vitality of *Universal Camera Corp. v. N. L. R. B.*, 340 U.S. 474, 496 (1951), and the court's more recent admonition that an ALJ's credibility findings should stand unless "reversal is supported by substantial record evidence." *TeleSTAR, Inc.*, 2 FCC Rcd 5, 13 (Rev. Bd. 1987) (quoting *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985)).[25] But, the Bureau urges that Goodson's testimony anent his telephone conversations is indeed supported by such substantial evidence, to wit:

> the record is clear that Goodson's notes, and tapes and transcripts of his conversations with Lee exist, that the notes were made contemporaneously, and that Goodson reviewed the notes, tapes and transcripts shortly before his testimony (Tr. 2099, 2106).

Mass Media Bureau Exceptions at 14.

35. We find that the Bureau cannot rely upon Goodson's alleged "tapes and transcripts" to overturn the ALJ's credibility findings: the rule of law requires the presence of "substantial *record* evidence," and the record is clear that no such tapes, transcripts, or notes of the conversations were ever introduced as evidence in this case. *I. D.*, para. 49 & n.6. Moreover, the Federal Rules of Evidence, under which FCC hearings are conducted (*see* 47 CFR §1.351), specifically provide:

> Requirement of Original
>
> To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Fed. R. Evid. 1002. *See also* 47 CFR §1.357 (*Mechanical Reproductions as Evidence*). And, appropriate authentication of such materials must precede the introduction thereof. Fed. R. Evid. 901. The Mass Media Bureau ignored all of these precautionary antecedents, did not introduce any of these materials into the record, and yet seeks in its exceptions to rely on such alleged materials to corroborate Goodson's discounted testimony. We agree with Silver Star that Goodson's testimony cannot be buttressed by any such non-record materials,[26] and we reject as grossly untimely the Bureau's post-oral argument motion to reopen the record to introduce such alleged materials, long after the hearing and opportunity for cross-examination have expired.[27]

36. The Bureau next contends that the ALJ's refusal to credit Goodson's testimony is unaccompanied by any specific adverse demeanor findings, citing *TeleSTAR, Inc., supra*.[28] We find, however, that the ALJ did make specific demeanor findings regarding Goodson's testimony. *I.D.*, paras. 112, 113. He also specifically noted Goodson's admitted hostility toward the Rivers clan, and he was puzzled by Goodson's motivation, interest, and participation in these subject affairs. For example, the ALJ observed that whereas Goodson claimed that he had long been aware of log falsification at Rivers' WTJH(AM), he waited three years to report the illicit conduct to the FCC. *Id.*, para. 111. Similarly, the record in this case reflects that Goodson claims to have been aware of the illicit "secret agreement" between Rivers and Dr. Lee since April 1984, yet Goodson was at pains on the witness stand to swear several times that he reported none of this to the FCC. Tr. 2084-2085. Goodson's role in advising Sara Howell and in following Dr. Lee's instructions in the preparation of the "Mutual Recognition and Agreement" (*see supra* para. 15) is also enigmatic, to say the least. And, Goodson's Cordele cable operation currently competes with WMJM(AM) and WFAV-FM for local advertising revenues. All this considered, the ALJ did not find Goodson to be a reliable witness on the very *narrow* question of whether Dr. Lee directly admitted to Goodson that a "secret agreement" existed between the Rivers and Silver Star. On that narrow point, again, and in the absence of any other witnesses to the purported telephonic admissions, Tr. 2084, we find insufficient record evidence to reverse the ALJ's credibility findings respecting Goodson's testimony. *TeleSTAR, supra*. There being no other direct evidence of a "secret agreement," we next review the circumstantial evidence to determine whether a "clear and convincing" case (*see supra* para. 25) has been made in support of the Bureau's contention.

37. *Circumstantial Evidence*. Almost by definition, a "secret agreement" must be inferred from circumstances, since there is ordinarily a paucity of direct evidence to demonstrate what is merely tacit. Still, "[s]ome circumstantial evidence is very strong, as when you find a trout in the milk."[29] In this proceeding, the Bureau adduced much evidence tending to show that, notwithstanding the representations of Ronald Rivers and Dr. Lee in October 1983, that there no longer existed an agreement between them respecting the future of the Rivers' four Georgia stations, a "secret agreement" lingered to retransfer the Cordele stations back to Ronald Rivers (and Sara Howell) as soon as the FCC might permit. The principal circumstantial evidence can be adumbrated as follows: (1) James Rivers' stated desire that Ronald Rivers and Sara Howell be permitted to reacquire the Cordele stations as soon as possible (*I.D.*, para. 9); (2) Dr. Lee's open admissions that he was never adverse to that reacquisition (*id.* ; *see also id.*, paras. 13, 50, 53); (3) the option agreement proffered with the WJAZ(AM) transmitter site lease which tied Dr. Lee's purchase of WJAZ(AM) from Dr. Finney to the resale of the Cordele stations (*id.*, paras. 16-18); (4) Silver Star's lackadaisicalness in pursuing Douglas M. Sutton's interest in purchasing the Cordele stations (*id.*, paras. 19-25); (5) Dr. Finney's letter of October 1984 to Dr. Lee urging a management plan for Cor-

dele "during the time that the FCC will be considering the transfer of that facility back to Mr. Rivers" (*id.*, para. 28); (6) Dr. Lee's request to William Goodson to compose a writing to recognize Sara Howell's 30% interest in the Cordele stations (*id.*, paras. 40-41); and (7) the equivocal (and/or evasive) testimony of Dr. Lee, James Rivers, and Ronald Rivers over whether a resale of the Cordele stations had been discussed or agreed upon (Bureau Exceptions at 13-17).

38. Silver Star's responses to the foregoing circumstantial evidence were: (1) that Silver Star never signed the "Mutual Recognition and Agreement" (*see supra* para. 15) recognizing Sara Howell's purported 30% interest in the Cordele stations (*I.D.*, para. 44); (2) that the "bargaining chip" options included with the WJAZ(AM) leases of December 1983 and January 1985 were never consummated (*id.*, para. 104); (3) that Silver Star did not actively follow-up on Douglas M. Sutton's offers for the Cordele stations after January 1984 because it had not decided what to do with those stations (*id.*, paras. 107-109); and (5) that inasmuch as Dr. Lee never disguised his willingness to resell the Cordele stations to Ronald Rivers - if the FCC would permit - there was no need for a "secret agreement."

39. However, as the Mass Media Bureau suggested at oral argument, the strongest evidence, perhaps, that Dr. Lee and the Rivers clan had covertly agreed that the Cordele stations *definitely* would be resold to Ronald Rivers was the overwhelming evidence that established a violation of Section 310(d). That is to say, not only did Silver Star decline to assume control of the Cordele stations in November 1984, Ronald Rivers *personally* financed the start-up operations of the Cordele stations, *I. D.*, paras. 66-69; and, by June 30, 1986, the "Salaries Payable" to Ronald Rivers had accrued in the amount of 31,543.34. *Id.*, para. 73. (Dr. Lee testified that he initially "did not notice" this latter item on the monthly balance sheet, *id.*, para. 74). Moreover, the record reflects that although Silver Star - nearly nine months after the FCC began its investigation - sent a30,000 check to James Rivers as its ostensible first payment on the400,000 note for the Cordele stations, James Rivers did not cash that check, *id.*, para. 84; and Silver Star did not replace the uncashed check until June 13, 1986, *id.*, some two months *after* the Commission issued its revocation hearing order in this case. Additionally, Ronald Rivers caused to be issued monthly checks in the amounts of900 and 500 to James Rivers for property rentals at the Cordele stations, *id.*, para. 82; none of these checks were cashed either. *Id.* Finally, and as previously discussed, Ronald Rivers consistently paid himself a salary in excess of his written contract with Silver Star, *id.*, para. 71, and he paid many of his personal expenses with station funds. *Id.*, para. 79. This indifference on the part of Silver Star to the significant monies owed to, and spent by, the Rivers clan gives rise to a very strong inference that the unbalanced accounts between Silver Star and the Rivers' interests were to be reconciled by a reassignment of the Cordele stations back to Ronald Rivers. No other explanation appears plausible, especially when it is recalled that although Silver Star could have sold the Cordele stations *immediately* to a racial minority purchaser (*see supra* note 5), as it did with WTJH(AM), East Point, there is no evidence that Silver Star took the slightest step to locate a racial minority buyer for the two Cordele stations it wished so ardently to divest.

40. In light of the weighty circumstantial evidence outlined above, the Board finds that a preponderance of the record evidence supports the Mass Media Bureau's thesis that there existed a tacit accord that the Cordele stations were to be beneficially owned by the Rivers interests and that there concurrently existed a "gentlemens' agreement" that Silver Star and Ronald Rivers would undo the 1984 "distress sale" of the Cordele stations. While conceding that there is an exceedingly fine line between Silver Star's quite open admission that it was always perfectly amenable to an attempt at an expeditious resale to Ronald Rivers, but that no such firm agreement had in fact been reached, and the Bureau's charge of the existence of an *actual* agreement from the word "go," substantial record evidence attends the Bureau's basic indictment. It also suggests a possible lack of candor and/or misrepresentation on the part of Dr. Lee. But, we need not decide whether the ALJ erred in failing to find a "secret agreement" by clear and convincing evidence, since we do find - as did the ALJ - that clear and convincing evidence does demonstrate an intentional abuse of the Commission's "distress sale" process, irrespective of whether a firm (or loose) resale agreement persisted between Silver Star and the Rivers, and without regard to whether any such tacit agreement would have violated contemporaneous FCC rules or policies.

41. In the *I.D.*, and after reviewing the evidence adduced under the Section 310(d) issue, the ALJ explicitly found Silver Star culpable of "abusing the Commission's distress sale policy." *Id.*, at para. 124. Having so concluded, it was incongruous to have decided Issue (a) in favor of the licensee. Issue (a) is deliberately framed to determine whether Silver Star abused the "distress sale" process in connection with the Commission's grant of the Cordele licenses to Silver Star. Though the term "abuse of process" is relatively general, the Commission just recently explained that:

> The term "abuse of process" is a very broad concept but generally can be defined as the use of a Commission process, procedure, or rule to achieve a result which that process, procedure, or rule was not designed or intended to achieve or, alternatively, *use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule.*

Policies and Rules Relating to Broadcast Renewal Applicants, FCC 88-212, released August 16, 1988, at n.2 (emphasis added). As should be obvious, the Commission's "distress sale" process, which Dr. Lee and Silver Star have taken advantage of in acquiring these and other broadcast stations (*see supra* para. 7), was strictly and expressly intended to expand " *minority ownership and participation in station management.* " *Minority Ownership of Broadcast Facilities, supra*, 68 FCC 2d at 982 (emphasis added). Yet, despite the patent purpose of this extraordinary FCC process, Silver Star acquired four "distressed" radio stations through the process with the express intent of bringing minority ownership and participation to only one of the four stations. It is true, as Silver Star counsel submitted at oral argument, that until November 1984 no Commission rule required retention of the stations for any minimum period of time. It is likewise correct that no Commission policy forbade or strongly dissuaded a party from acquiring a broadcast license, and publicly announcing an intent to divest the station, either simultaneously or

in short order. *See Newsystems of Pennsylvania, Inc.*, 2 FCC Rcd 73, 74 (1987). Be that as it may, Silver Star's actions here constituted clear abuse in that, in the face of the Commission's express November 1984 change of station retention policy, and the ALJ's prior admonition that Ronald Rivers' basic qualifications to operate a broadcast station would routinely require further FCC inquiry, *see, e.g., Peoples Broadcasting Corp., supra*, 92 FCC 2d at 1305-1317 (applicant found effectively disqualified for actions taken as sales manager and as general manager of predecessor station, license for which was lost for misconduct), Silver Star accepted the licenses for the Cordele stations in November 1984, and never assumed control over those two stations from Ronald Rivers, a fact it does not here deny in the form of exceptions to the I.D. This course of conduct is the quintessence of "abuse of process" as defined by the Commission: Silver Star deliberately utilized the minority "distress sale" process "to achieve a result which that process . . . was not . . . intended to achieve" and it willfully "subvert[ed] the underlying intended purpose of that process." It made no attempt to assert minority control over the Cordele stations, or to inject its own minority participation into station operations. Indeed, Silver Star adamantly insisted before the ALJ that, once it received the Cordele licenses, nothing changed: neither station management, nor programming, nor public service policy.[30] Rather, as Dr. Lee testified, Silver Star simply left Ronald Rivers in place, invested no money or legitimate managerial effort in the stations (I.D., para. 116), set no station policies (id.), and permitted Ronald Rivers to exercise complete dominion over the operations (id., paras. 117-119), all with the admitted intention of selling the stations as soon as possible to Rivers (or, hypothetically, someone else). No conclusion is possible other than a witting abuse of the Commission's minority "distress sale" process, and we agree with the ALJ that the evidence adduced under the Section 310(d) issue coevally proves clearly and convincingly that the extraordinary "distress sale" process was knowingly subverted by Silver Star.

ISSUE (b): SECTION 1.65

42. Although neither the I.D. nor the Mass Media Bureau's exceptions concentrate in a focused fashion on this subissue, it appears that this inquiry was keyed to the Bureau's postulate that there existed the "secret agreement" between the Rivers and Silver Star at the time the "distress sale" application was pending before the FCC, and that Dr. Lee's failure to report this "secret agreement" to the Commission during the pendency of that assignment application constituted a violation of 47 CFR §1.65. [31] Because we have not disturbed the ALJ's conclusion that the existence of an actual "secret agreement" was not proved by clear and convincing evidence, we cannot hold, by that same standard, that an actionable violation of Section 1.65 has occurred in this respect.

ISSUE (c): UNAUTHORIZED CONTROL

43. As indicated, Silver Star has not excepted to the ALJ's conclusion that it "willfully and repeatedly violated Section 310(d) of the Communications Act." I.D., at para. 124. At oral argument, counsel for Silver Star was questioned on its failure to except to that adverse conclusion, and counsel replied[32]:

> Why I did not file an exception is because basically I am in agreement with the ALJ's decision in terms of its cost to my client. And that's the primary reason. The ALJ decision says basically Lee remains qualified to be a licensee and it also fines us20,000. That's one reason we're ready to pay the20,000 and get out of here.

Accordingly, the ALJ's determination on this issue is legally unchallenged and shall stand. Issue (d) is a conclusionary and remedial query, to be based upon the resolution of Issues (a) thru (c), and we address this in our own conclusions, *infra* para. 51, *et seq.*

ISSUE (e): DISCOVERY ABUSES

44. Upon motion of the Mass Media Bureau, the ALJ added this issue during the course of the hearing,[33] when it appeared that Silver Star had failed to produce all relevant documents and failed to answer interrogatories. *I.D.*, paras. 86-91. At hearing, it turns out that certain key documents were not produced because Silver Star counsel did not ask Dr. Charles Finney for any and all relevant documents, believing that the Bureau would obtain any such documents at deposition. As to its failure to answer interrogatories, even after the ALJ granted a Bureau motion to compel, Silver Star counsel asserted that he believed the interrogatories to be "redundant" after depositions, and that he never received a copy of the Bureau's motion to compel answers or the ALJ's order granting that motion. The ALJ concluded that these lapses were not so severe as to be disqualifying. *Id.*, para. 121. The Mass Media Bureau does not except to this conclusion,[34] so it too shall stand.

ISSUE (f): FILING ABUSES

45. At the time the Commission was contemplating the proposed "distress sale" of the four Rivers Georgia stations to Silver Star, it discovered - apparently for the first time - that it had twice erred in the licensing of WFAV-FM, Cordele, and WJIZ-FM, Albany, in that both the initial grant to WFAV-FM (1968) and a subsequent modification of the license of WJIZ-FM (1971) were in violation of the signal overlap prohibitions of (former) Section 73.240 of the Commission's Rules, (former) 47 CFR §73.240. *I.D.*, para. 92. Despite the prohibited overlap of the 1 mV/m contours of these two stations, and the Commission's cognition of its two previous licensing errors, it opted to ignore those prior oversights in approving the "distress sale" to Silver Star, *id.*, para. 93; but it did condition its May 1984 grant to Silver Star as follows:

> (1) Silver Star may not seek to modify either facility in a manner that would increase the existing 1 mV/m contour overlap between WFAV and WJIZ; and
>
> (2) Silver Star is prohibited from transferring both WFAV and WJIZ to the same entity or entities under common control. In effect, the existing multiple ownership violation by WFAV and WJIZ will be grand- fathered until any future transfer assignment of those stations by Silver Star.

Id., at para. 92 (quoting Mass Media Bureau Exh. 53).

46. Nevertheless, in early 1987, Silver Star did file an application with the FCC to increase the antenna height of WJIZ-FM (the only Rivers station it intended to retain) from 470 feet to 1125 feet, a modification that would have increased the overlap with WFAV-FM by another 53%.[35] However[36]:

> The WJIZ upgrade application tendered by Silver Star did not depict the existing contours of WJIZ or WFAV. Nor did the application mention the existing and proposed overlap situation between the two stations (MMB Ex. 66).

Silver Star defended against the Bureau's charge that its modification application constituted an abuse of process by asserting (1) that it believed that the Commission's policy change of April 21, 1986, requiring Class C FM stations (such as WJIZ-FM) to either upgrade their facilities by March 2, 1987 or face downgrading to Class C1 or C2 status, thus significantly devaluing the facility, to have superceded the Commission's 1984 conditions on its "distress sale" grant (*I.D.*, paras. 94, 97); and (2) that it assumed the FCC understood the situation in Cordele, and would permit Silver Star to avoid the downgrade potential at WJIZ-FM, and obviate the overlap problem with WFAV-FM, by permitting it to sell the Cordele stations. *Id.*, para. 97. But, the Bureau dismissed the WJIZ-FM modification application on April 16, 1987, *id.*, and it petitioned the ALJ presiding in the instant hearing to add the subject abuse of process issue, which the ALJ did on April 24, 1987. *Id.*, para. 3.

47. After considering the evidence presented thereunder, the ALJ found no abuse of process, holding that "there can be no meaningful prohibition against a citizen merely *asking* [the] government for desired relief, and there is truly no harm in asking." *Id.*, at para. 123 (emphasis in original). The Mass Media Bureau excepts to that conclusion, contending that by failing to adhere to the Commission's 1984 grant conditions, or to depict the signal contours in its 1987 modification application, or mention the existing and/or proposed signal overlap, or to expressly seek a waiver of the grant conditions or the rules,[37] Silver Star "abused the Commission's distress sale process by intentionally trying to 'pull a fast one' on the Commission" by filing the WJIZ-FM upgrade application.[38] It further submits that Silver Star's "deceptive" conduct in these actions amounts to misrepresentation, which independently warrants revocation of the Cordele licenses.[39]

48. We reject the Bureau's exceptions on this issue for several reasons. First, while Silver Star plainly should have been more forthcoming in its modification application, certainly under the tenets of 47 CFR §1.65, Silver Star has contended that it presumed that the Mass Media Bureau (which processes such applications) was well aware of the overlap situation between WJIZ-FM and WFAV-FM, and of the prior conditions placed on its grant; and Silver Star further presumed that the Bureau would dispose of its modification application in a manner consistent with Commission rules and extant policies. The Bureau would vigorously dispute these two presumptions, and it maintains that Silver Star's misconduct here proves it again untrustworthy to be a licensee. The Board appreciates that Silver Star's dual presumptions that the Mass Media Bureau would be aware of the signal overlap situation and would treat its application in accord with all prevailing rules and policies is undercut somewhat by the fact that, twice before (in 1968 and 1971), the Bureau had erred in the licensing of these same two stations, all in derogation of FCC signal overlap rules. Yet, the Board has long held that where information is publicly on file with the Commission, no complete disqualification is warranted for a failure to rehearse that information. *See , e.g., Superior Broadcasting of California*, 94 FCC 2d 904, 909-910 & n.5. (Rev. Bd. 1983); *accord, Payne Communications, Inc.*, 1 FCC Rcd 1052, 1058 (Rev. Bd. 1986); *Omaha TV, Inc.*, 102 FCC 2d 875, 886 (Rev. Bd. 1985); *Intercontinental Radio, Inc.*, 98 FCC 2d 608, 639 (Rev. Bd. 1984).

49. Second, for the reasons iterated *supra*, paras. 26-30, we cannot accept the Bureau's charge that Silver Star should be disqualified for misrepresentation or lack of candor in connection with its WJIZ-FM upgrade application. No such specific issues were added or requested in this case. Even had they been, it is difficult to perceive how an intent to deceive could be proved when the overlap information was on public file with the Bureau. *See Superior Broadcasting, supra*. As indicated in the *I.D.*, the Bureau was constructively aware of the overlap and of the "distress sale" conditions placed on Silver Star, and it quickly rejected the WJIZ-FM application based on that knowledge, thus vindicating Silver Star's presumption that the Commission's Mass Media Bureau would take appropriate action on its application and burnishing our own conviction that the Bureau is not easily traduced.

50. Finally, we note, again, that Issue (f) is framed as an abuse of process issue; and, more precisely, an abuse of the minority "distress sale" process at that. Referencing, once more, the Commission's definition of abuse of process (*see supra* para. 41), it would seem clear that Silver Star's actions here are not within the purview of that offense. That is, the WJIZ-FM upgrade application was assuredly not intended "to achieve a result which that process . . . was not designed . . . to achieve" or tendered "in a manner which subverts the underlying intended purpose of that process." From all that the record shows, Silver Star had no ulterior motive in its filing: its *prima facie* purpose was identical with its *true* purpose, *viz.*, to receive authority to increase the antenna height of WJIZ-FM. This was no "strike" application, or sham petition to deny, or a pleading interposed solely for delay, or a repetitious or patently frivolous application, or any other attempt to waste the Commission's processes by attempting to achieve an actual result other than that pretended. Thus considered, we cannot find in Silver Star's actions here an abuse of process, *see generally Character Policy Statement*, 102 FCC 2d 1179, 1211 (1986), let alone an abuse of the Commission's minority "distress sale" process. It is not surprising, therefore, that neither the Bureau's exceptions[40] nor its legal proposals to the ALJ[41] cite a single case or apposite precedent in support of this abuse theory. We have already joined the ALJ in finding an abuse of the Commission's "distress sale" process by virtue of Silver Star's other actions, but can find no such disqualifying delict under this particular issue.

CONCLUSIONS

51. Having reviewed the record and the exceptions, we find ourselves in fundamental agreement with the ALJ's conclusion that Silver Star willfully violated Section 310(d) of the Communications Act and coterminously abused the Commission's "distress sale" process in the

perverse manner of its statutory violation. We also affirm the ALJ in his resolution of the other designated issues. Issue (d) to be discussed below. With the licensee having filed no exceptions to the *I.D.*, what remains is the Mass Media Bureau's exception to the remedy imposed by the ALJ, the Bureau insisting that the licensee's actions here demand a revocation of the licenses of Silver Star's Cordele stations, and not the20,000 fine levied below.[42]

52. In declining that license revocation was not warranted here under Issue (d), the ALJ invoked *Blue Ribbon Broadcasting, Inc.*, *supra*, and *Stereo Broadcasters, Inc.*, *supra*, for the proposition that an unauthorized transfer of control, unaccompanied by deception, misrepresentation or lack of candor, does not compel license loss. *I.D.*, para. 120. The Mass Media Bureau does not facially challenge the ALJ's statement of the law.[43] Rather, as we have discussed earlier (*see supra*, para. 26), the Bureau's argument for the penalty of revocation is interlaced with its own conclusory premise that misrepresentation and lack of candor *were* proved in this case by clear and convincing evidence. However, for the reasons explicated previously (*see supra*, paras. 27-30), the Board has been constrained to hold that no misrepresentation or lack of candor issues were designated or tried in this case. The question before us, then, is whether *Blue Ribbon*, or cases such as *Deer Lodge Broadcasting, Inc.*, 86 FCC 2d 1066 (1981), control the remedial issue in this case.

53. Many broadcast licenses have been lost for violation of Section 310(d). *Stereo Broadcasters, supra*; *Medford Broadcasters, Inc.*, 34 FCC 2d 989 (1972); *Television Company of America*, 1 FCC 2d 91 (1965); *KPSR, Inc.*, 33 FCC 391 (1962); *WDUL Television Corp.*, 33 FCC 149 (1962)(subsequent history omitted). The courts also have upheld the Commission in disqualifying licensees for an unauthorized transfer of control. *See, e.g., Lorain Journal Company v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967, *reh. denied*, 384 U.S. 947, *petition to reopen denied*, 4 FCC 2d 608 (1966). Nonetheless, the Commission has more recently held that not every violation of Section 310(d) calls for our most severe sanction. For example, in *Deer Lodge*, the Commission sustained an ALJ in his finding of an unauthorized transfer of *de facto* control, but it imposed only a short-term renewal as a remedy. 86 FCC 2d at 1098-1099. In *Blue Ribbon*, another revocation case involving Section 310(d), no penalty ensued whatever.

54. After analyzing the case law, we find that neither *Deer Lodge* nor *Blue Ribbon* is controlling here. Whereas the Commission found a violation of Section 310(d) in *Deer Lodge*, it took witness of several mitigating circumstances. Thus, though it found that a "management" agreement between the licensee, who was initially a court-appointed receiver, and another party raised an "initial doubt" that the licensee intended to maintain control over KDRG:

> . . . it appears that Mr. Fransen, who is the sole owner of Deer Lodge, did not intend to surrender as much control over KDRG's operation as the literal wording of the Agreement indicated he would surrender, and that he did not understand that, taken literally, the Agreement provided for an unauthorized transfer of control of station KDRG.

86 FCC 2d at 1098. Moreover, the Commission found no deception because the overdrawn KDRG "management" agreement was duly filed with the FCC "and Mr. Fransen on his own volition sought to regain control of the station before any Commission action was taken with respect to this matter." *Id.*, at 1097. The Commission ultimately concluded that the *Deer Lodge* licensee showed no "intention to violate our Rules or the Communications Act." *Id.*, at 1098. Here, the record is far different. Not only is it shown that Silver Star never assumed control of the Cordele stations in November 1984 (*see supra* para. 19 and *I.D.*, paras. 64-85), the record further reflects that Silver Star made no attempt to assert control over the stations until June 4, 1986, two months *after* the Commission designated these licenses for a revocation hearing. *Id.*, para. 85.[44] Again, Silver Star does not except to the ALJ's conclusion that it willfully violated Section 310(d).

55. *Blue Ribbon* is even less on point. There, the Review Board held that any violations of Section 310(d) were "occasional lapses" which were "neither serious nor prolonged." 90 FCC 2d at 1028. The Board more fully explained:

> In neither instance has a serious or covert transfer of control been demonstrated. The steps taken by the parties to manage and maintain the station were made known to the Commission; and, even if fleeting or technical *de facto* transfers did occur at one particular point or another, these were essentially *de minimis*. Significantly, no culpable non-disclosure or concealment in this regard appears on the record. While we do not condone or approve of the active role played by the prospective purchasers in this case, and their conduct did occasionally raise the specter of unauthorized transfers of control (*see Fine Arts Broadcasting, Inc.*, 57 FCC 2d 108, 35 RR 2d 1169 (1975); *Phoenix Broadcasting Co.*, 44 FCC 2d 838, 29 RR 2d 187 (1973)), the severe sanction of revocation of license is not warranted in this situation.

Id., at 1026. By contrast, the Section 310(d) violation in this case was cynical and continuous, from Silver Star's acquisition of the stations in November 1984 until two months after these licenses were set for revocation hearing. Its indifference to its statutory obligation to take control of the Cordele stations separates it by linear leagues from *Blue Ribbon*.

56. But what clearly sets this case apart is that this is not simply a mundane *de facto* control situation. At oral argument, Silver Star counsel referenced the recent questions regarding the management change at CBS, Inc. (*see Letter to William S. Paley*, 1 FCC Rcd 1025 (1986), *aff'd per judgment subnom. Fairness in Media v. FCC*, 851 F.2d 1500 (D.C. Cir 1988)(table)), and suggested that the "big boy" was given a base on balls, while Silver Star is here being persecuted by the Mass Media Bureau.[45] The comparison is not well-taken. This record presents no such delicate conundrum as to who controls a large corporate entity for Section 310 purposes: the stockholders, the directors, or the corporate officers. These inquiries are, indeed, of Goethean devilment. *See Storer Communications, Inc. v. FCC*, 763 F.2d 436 (D.C. Cir. 1985). Nor are we dealing here with a "technical" question of *de facto* con-

trol. *Spanish International Communications Corp.*, 2 FCC Rcd 3336 (1987). What we have here is of a different quality entirely: a licensee who voluntarily acquired at least two radio stations it avowedly did not want, at 75% of market value and under an extraordinary process that encourages minority control and participation in station operation, with the express purpose of assigning those stations in a nanosecond, if possible. And, again if possible, to a member of the same Rivers family from whence they came, despite prior discouragement from FCC officials. *See supra* paras. 8-9. When Silver Star's ambition to briskly jettison the Cordele stations was frustrated by an interjacent correction in Commission policy, hence requiring Silver Star to operate the stations for a bare minimum of one year, it did the next best thing: it simply never took control over the stations in the first instance, leaving them instead in the familiar embrace of the very individual who had managed the Cordele stations at the time of the misconduct that provoked the "distress sale." In the sport of football, Silver Star's play here would be labeled a "naked end-around." All the time, Silver Star was fully aware that unresolved questions remained at the Commission as to whether Ronald Rivers possessed the basic qualifications to control a broadcast station. *See id.; see also* Mass Media Bureau Exh. 30, p.10 (Silver Star admission that Dr. Lee "thought all along that the FCC was unwilling to grant approval of any transfer from Silver Star to Ronald Rivers"). In this, Silver Star has evinced a contumely for the Communications Act and a contempt for the Commission's minority "distress sale" process that informs the Mass Media Bureau's clamor for absolute license revocation. The Board agrees that Silver Star's willful violation of Section 310(d) is compounded by conduct fully as egregious as misrepresentation or lack of candor, and equally as telling as to its trustworthiness; to wit, a callous abuse of the "distress sale" process, the *singular* goal of which is to promote diversity of control of broadcast stations in the hope of increasing content diversity. *Minority Ownership of Broadcast Facilities, supra* 68 FCC 2d at 982.

57. Nonetheless, the Board has asked the parties to brief the question as to whether the Commission's lenience in *George E. Cameron, Jr. Communications,* 56 RR 2d 825 (1984), served as a precedent for here permitting a remedy less onerous than loss of both Cordele stations. *Cameron* was a case also centering around an unauthorized transfer of *de facto* control, a transfer effected in the face of a prior FCC cautioning, and was aggravated by misrepresentation as well as by serious technical violations, for which derelictions both the ALJ and the Review Board found the licensee unqualified to hold any broadcast license.[46] Later, the Commission approved a settlement in *Cameron* that allowed a prime malfeasor to retain the more valuable Burbank, California FM radio station license. 56 RR 2d at 828.

58. Not wishing the agency here to emulate Browning's Caliban on Setebos, who would let "twenty pass and stone the twenty-first; Loving not, hating not, just choosing so,"[47] we requested the Mass Media Bureau to differentiate *Cameron* from the instant situation, so that our application of remedy might be fully consistent with recent precedent. The Bureau has responded (1) that both the Board and the Commission found the *Cameron* principals to have been "thoroughly open and candid" under the Section 310(d) issue; (2) that the *Cameron* Commission found "positive aspects" in that particular unauthorized transfer of control, because the usurper there returned silent stations to the air, while Silver Star here wholly abdicated control over the stations and collaterally undermined the discrete "public interest" in minority control; and (3) that the *Cameron* usurper lost an AM station, while the original licensee principals received no compensation and "retire[d] from broadcasting."[48] Silver Star retorts that "[e]ven though there may have been an unauthorized transfer of control of WFAV and WMJM, clearly there were some positive aspects to this control: A) The public interest was served; B) There was no interruption of radio broadcasting service in the market area; C) There was no indication of complaints by the public with respect to station operations."[49]

59. We must observe that the *Cameron* Commission itself described that situation as "unusual and complex," thereby giving rise to "peculiar equities." 56 RR 2d at 828. Dissenting Commissioner Henry M. Rivera elaborated more colorfully, describing the Commission's extraordinary relief in that case as "creat[ing] a new addition to our elite herd of 'purple cows'," *id.*, at 1299, 1300, and the Board accords with the thrust of the Mass Media Bureau's transcendent contention that the unique remedy permitted in *Cameron* is on a remote suburban spur of the Commission's main line precedent. *See* Dissenting Statement of Comm'r Rivera (and cases cited therein). *See also RKO General, Inc. (KHJ - TV)*, 3 FCC Rcd 5057, 5068-5069 & n.2 (1988) (Dissenting Statement of Comm'r Patricia Diaz Dennis) (*Cameron* of "minimal precedential value"). In any event, after considering this record, the Board can here find neither the "unusual and complex" circumstances, the "positive aspects," nor the "peculiar equities" adverted to by the *Cameron* Commission. More practically speaking, short of revocation, it is difficult to fashion a legally prescribed remedy for Silver Star's misconduct. We thoroughly concur with the Mass Media Bureau that permitting (or compelling) this licensee to divest the Cordele stations (even if the precedent permitted) would be bizarre under the facts of this case, and far more reward than remedy, when it is recalled that the core of Silver Star's offense is that it sought from the outset of its Cordele licenseeship to be relieved of the burden of those licenses, despite its acute awareness of the 1984 change in "distress sale" policy requiring it to retain and operate the stations for a minimum of one year.[50] Ironically, given Silver Star's disdain for these stations, a more fitting retribution might be an injunction that Silver Star properly operate the orphaned facilities for a minimum of two complete license terms, but the Board has neither the institutional temperament nor the authority for exacting such remorseless atonement. Finally, in adopting its one-year retention requirement for "distress sale" beneficiaries, even the dissenting Commissioners (including current Chairman Dennis R. Patrick) opined that a "distress sale" beneficiary that had miscast "its original intent to operate the station" would be deemed of unfit character, and denied the opportunity to later sell out.[51]

60. In the end, the central question as to remedy is whether the record reveals violations of the Communications Act and/or Commission rules and policies sufficiently grave so that the licensee has been exposed as utterly untrustworthy to hold the subject licenses. *See Character Policy Statement, supra*, 102 FCC 2d at 1209-1210. In acquiring at least two stations it did not wish to own or operate through the extraordinary "distress sale" process, and in defying a policy change requiring it to maintain

those stations for at least one year by abdicating control, *ab initio*, to an individual Silver Star knew to have questionable FCC credentials, this licensee has answered the operative question as to its trustworthiness.[52] As Silver Star did not trust *itself* to operate this pair of radio stations, it can scarcely anticipate superior trust from the FCC. Any relief short of license revocation as a result of Silver Star's abuse of the Commission's minority "distress sale" process and its willful statutory violation must come from the full Commission, which can and frequently does alter its policies in the adjudicatory context, and not from this subordinate Board,[53] which must duly apply regnant precedent.

61. ACCORDINGLY, IT IS ORDERED, That the "Motion for Expedited Hearing" filed on June 7, 1988 by Silver Star Communications-Albany, Inc. IS DISMISSED as moot;

62. IT IS FURTHER ORDERED, That paragraphs 7-9 (Petition to Reopen the Record) and the Attachment to the "Consolidated Brief and Motion to Reopen the Record," filed on August 8, 1988 by the Mass Media Bureau, ARE STRICKEN; and

63. IT IS FURTHER ORDERED, That the licenses of Silver Star Communications-Albany, Inc. for aural broadcast Stations WMJM(AM) and WFAV-FM, Cordele, Georgia ARE REVOKED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Section 312(a)(2) authorizes the Commmission to revoke a station license "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application." Section 310(d) enjoins any transfer of control of a construction permit or station license "except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."

[2] *See Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026 (D.C. Cir. 1981).

[3] It was not until November 8, 1984 that the Commission adopted the requirement that the recipient of a "distress sale" license retain the station for at least one year after acquisition. *Applications for Voluntary Assignments or Transfer of Control*, 99 FCC 2d 971, 974 (1985).

[4] Quoting "Mutual Recognition and Agreement," in which Sara Howell sought to have Dr. Lee recognize (1) her sexual harassment grievance against James Rivers and (2) her 30% interest in Southeastern Broadcasting System, Inc., the actual corporate licensee of Rivers' Cordele stations.

[5] There yet remained one loophole by which Silver Star could alienate the Rivers stations without meeting the new one-year holding period: it could resell the stations to another "minority-owned or controlled entity." *Applications for Voluntary Assignments or Transfer of Control, supra* note 3, 99 FCC 2d at 974. It did so by selling WTJH(AM), East Point, Georgia, almost immediately to a racial minority purchaser.

[6] The term "decent interval," coined pursuant to the Paris Peace Talks of the early 1970's, signified the tacit agreement between the U.S. and North Vietnam that North Vietnam would defer any invasive action in South Vietnam while American troops were in the process of withdrawal, so as to avoid any immediate embarrassment to the U.S.

[7] Silver Star formally acquired WJAZ(AM) from Dr. Finney on December 30, 1985. *I.D.*, para. 63.

[8] Silver Star did eventually obtain a100,000 line of credit (after the infusion of several new stockholders), but the money was used solely for WJIZ-FM. *I.D.*, para. 65.

[9] Mass Media Bureau Exceptions at 5. It is true, as Silver Star counsel noted at oral argument, that the burden of proceeding was here on the Mass Media Bureau (47 U.S.C. §312(d)). However:

> [W]here a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted.

Steadman v. SEC, 450 U.S. 91, 101 (1981)(quoting APA legislative history).

[10] There would appear to be an incongruity between the ALJ's resolution of Issue (a) in favor of the licensee and his holding, in the very next sentence, that Silver Star was shown to be culpable of "abusing the Commission's distress sale policy." We will treat with this matter in our substantive discussion of Issue (a), *infra* paras. 31-41.

[11] It further appears, in the breach at least, that the ALJ used the "clear and convincing" standard as against Issues (e) and (f) as well.

[12] Mass Media Bureau Exceptions at 26; *see also* Tr. of Oral Arg. at 3158-3160.

[13] Ultimately, the *Sea Island* court accepted the FCC's contention that revocation would have occurred in that case even if the agency had used the "clear and convincing" standard. 627 F.2d at 244.

[14] Broadcast license revocation proceedings are governed by 5 U.S.C. §556. *See* 47 U.S.C. §312(e). *See generally also* 5 U.S.C. §558(c).

[15] The Board has also acknowledged the teachings of *Steadman* in *Seven Hills Television Co.*, 2 FCC Rcd 6867, 6886 (Rev. Bd. 1987); *Gilmore Broadcasting Corp.*, 95 FCC 2d 289, 301 n.1 (Rev. Bd. 1983) (separate statement).

[16] The complete text of the court's *Citizens for Jazz* footnote reads:

> The Commission did not observe that the standard set forth in the quoted ALJ opinion in *Overmyer* was disapproved (in favor of the "preponderance-of-the-evidence" standard) by the Review Board. *See Overmyer Communications Co.*, 54 F.C.C.2d 1045, 1060 (1975). However, since petitioner has not challenged this application of a higher-than-usual standard of proof to the merits determination, we assume, without deciding, that it is valid. *But see*, in addition to the Review Board opinion in *Overmyer, Lewel Broadcasting, Inc.*, 86 F.C.C.2d 896, 914 (1981). *Cf. Steadman v. SEC*, 450 U.S. 91 (1981). *See generally* Murchison, *Misrepresentation and the FCC*, 37 FED. Com. L.J. 403, 446-50 (1985).

However, whereas the above *Citizens for Jazz* footnote questions the appropriate standard of proof utilized with respect to a "misrepresentation" issue, there is - as discussed *infra* paras. 26-30 - no such issue in this case, making the entire *Citizens for Jazz* footnote facially inapposite.

[17] The complete text of the Commission's *Riverside* footnote reads:

> The Court noted that the "clear, precise and indubitable" standard applied in the Commission *Orders* was disapproved (in favor of the "preponderance of the evidence" standard) by the Review Board in *Overmyer Communications Co.*, 54 FCC 2d 1045, 1060 (1975). However, the Court stated, "since petitioners [sic] has not challenged the application of a higher-than-usualstandard of proof to the merits determination, we assume, without deciding, that it is correct." 775 F.2d at 395, note 1. The Court is correct that ordinarily the burden at hearing is satisfied by a preponderance of the evidence. *Overmyer, supra. See also St. Cross Broadcasting, Inc.*, 49 FCC 2d 996, 997 (1974); and *Lewel Broadcasting, Inc.*, 86 FCC 2d 896, 913-4 (1981).

It is also significant that neither Judge Scalia's footnote, above, nor the Commission's responsive note, cited *Sea Island*.

[18] Like Judge Scalia, the Board does not decide that the Commission might not, in some circumstances, have the authority to prescribe a "clear and convincing" standard. But, taking example from Judge Scalia's own intellectual integrity, we too will " *Cf.* " *Steadman*.

[19] *See also* Tr. of Oral Arg. at 3275.

[20] *See, e.g.*, Mass Media Bureau Exceptions at 19, 20, 25, 26, 27.

[21] Tr. of Oral Arg. at 3156; *see also id.*, at 3157.

[22] *Modified*, 93 FCC 2d 127 (1983), *recon. dismissed*, FCC 831-43, released April 20, 1983.

[23] The Commission's modification of the Board's *Fox River* decision reserved judgment on whether misrepresentation in FCC proceedings was tantamount to a violation of 18 U.S.C. §1001. However, shortly after the Commission's *Fox River* decision, the court in *Pass Word, Inc. v. FCC*, 673 F.2d 1363, 1364 n.2 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 840 (1982) equated the two, and it appears that the Commission now recognizes that willful misrepresentations before the FCC could subject the perpetrator to prosecution under 18 U.S.C. §1001. *See Policies and Rules Relating to Broadcast Renewal Applicants*, FCC 88-212, released August 16, 1988, at para. 28.

[24] This situation is to be distinguished from that occurring in *KQED, Inc., supra*, where notwithstandingthe specific designation of a misrepresentation issue and the ALJ's conclusion that the licensee there lacked the requisite candor with the FCC, the ALJ exonerated the licensee because (in his view) there was no specific lack of candor issue present in that proceeding. Finding that, consistent with *West Coast Media*, the licensee in that case was on crystal clear notice that its truthfulness and any intent to deceive were, in fact, *the issue* in that license renewal hearing, the Board reversed. 3 FCC Rcd at 2826-2827.

[25] *Remanded*, 2 FCC Rcd 7352 (1987), *reconsideration and review granted* in part, 3 FCC Rcd 2860 (1988).

[26] At hearing, counsel for Silver Star declined to peruse the alleged Goodson transcripts and notes of the telephone conversations, stating:

> Your Honor, my response to that is, absent the necessary predicate for admissions of the tape recordings, I have no desire to listen to the tapes nor look at the notes. I think that the testimony of this witness should stand on its own weight with respect to credibility, and the weight of his testimony in this proceeding.

Tr. 2112. We know not whether the "necessary predicate" alluded to by counsel was the authentication procedures called for by the rules of evidence. Suffice it now that none of these materials is on the record.

[27] Mass Media Bureau's Consolidated Brief and Motion to Reopen the Record, filed August 8, 1988. The Bureau has not met the requirements for reopening the record, *see Southeast Arkansas Radio, Inc.*, 61 FCC 2d 72, 74 (1976)(petition to reopen record must be supported by newly discovered evidence; facts relied on must show petitioner could not with due diligence have known or discovered the facts during hearing; and evidence must be decisional). And, as we have reiterated many times, a litigant may not "sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence." *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941). Furthermore, to the extent that the Bureau has attempted to resurrect these alleged notes by appending such matter to its petition to reopen, we strike that portion of its pleading and its appendix.

[28] Bureau Exceptions at 13. We note that although the Commission remanded *TeleSTAR* to the ALJ, in part, so that specific demeanor findings could be made, 2 FCC Rcd at 7353, we further note that the Commission ultimately found that applicant disqualified for false testimony, without additional hearings or specific demeanor findings. 3 FCC Rcd 2860 (1988).

[29] Henry David Thoreau, Journ al (November 11, 1854).

[30] Brief and Appendix of Licensee at 28 (presumably, Silver Star's proposed findings of fact and conclusions of law).

[31] Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law, filed August 28, 1987, at 116-117.

[32] Tr. of Oral Arg. at 3239.

[33] *Memorandum Opinion and Order*, FCC 87M-903, released April 24, 1987.

[34] Mass Media Bureau Exceptions at 5.

[35] Mass Media Bureau's Proposed Findings of Fact, *supra* note 31, at 99.

[36] *Id.*, at 98.

[37] *Mass Media Bureau Proposed Conclusions of Law, supra* note 31, at 137. Because Silver Star sought no waiver of the 1984 licensing conditions or the rules, we need not ruminate as to whether Silver Star had an inviolable right to seek a waiver under the rigors of *WAIT RADIO v.* FCC, 418 F.2d 1153 (D.C. Cir. 1969)(waiver requests must be given "hard look).

[38] *Mass Media Bureau Exceptions* at 23.

[39] *Id.*, at 22-25.

[40] *See id.*

[41] Mass Media Bureau Proposed Conclusions of Law, *supra* note 31, at 135-138.

[42] *See Mass Media Bureau Exceptions* at 17-22; 26-28.

[43] *See id.*, at 27.

[44] There is a dispute on the record as to whether Silver Star filed its 1984 "management" contract with Ronald Rivers with the FCC. Silver Star contends that its attorney did file the agreement along with a periodic ownership report, but the Bureau maintains that FCC files reveal no traces of that contract. *See id.*, at 21. This

matter is essentially irrelevant, since it is clear that Silver Star paid no attention whatever to the Rivers' employment contract, I.D. paras. 71-77, and that Ronald Rivers was never a mere employee, irrespective of contract language.

[45] Tr. of Oral Arg. at 3286.

[46] *See George E. Cameron, Jr. Communications*, 91 FCC 2d 870 (Rev. Bd. 1982), *recon. denied*, 93 FCC 2d 789 (Rev. Bd. 1983).

[47] In the more pedestrian parlance of 5 U.S.C. §706(2)(A), the key phrase is "arbitrary, capricious, an abuse of discretion." *See also Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965)(similiarly situated applicants must suffer same fate).

[48] *Mass Media Bureau's Consolidated Brief, supra* note 27, at 2-4.

[49] Response of Licensee to Mass Media Bureau's Consolidated Brief and Motion to Reopen the Record, filed August 23, 1988.

[50] The Board is aware that there is currently before the full Commission a petition to permit Silver Star to assign the Cordele licenses to another party. Comments of Mattox-Guest Broadcasting, Inc., filed June 13, 1988. However, no action need be taken by Board on these comments, which ostensibly seek only an "expedited hearing" on the I.D. We thank the intervenor for its Guest appearance, and have endeavored to comply with its request.

[51] *Applications for Voluntary Assignments or Transfer of Control, supra* note 3, 99 FCC 2d at 977 (dissenting statement).

[52] Our judgment here is directed solely to the licensee's qualifications to retain the two subject Cordele stations. Silver Star and/or Dr. John Robert E. Lee (and/or other licensee principals) hold additional FCC broadcast licenses, *see supra* para. 7, but the court has observed that different stations have different histories, and that offenses relating to one (or more) of a multiple station owner's facilities need not affect its basic qualifications with respect to others. *RKO General, Inc. v. FCC, supra* para. 27, 670 F.2d at 236-237; *see also Character Policy Statement, supra*, 102 FCC 2d at 1220-1228; *KQED, Inc., supra* para. 27, 3 FCC Rcd at 2828-2829. And, more specifically, *see Lorain Journal, supra*, 351 F.2d at 826, 830-831 (§310 violation does not disqualify licensee for other stations). After reviewing this record, the Commission will have ample opportunity to decide whether further action is warranted.

[53] Board Chariman Marino while joining in this *Decision* adheres to the views set out in *Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126, 2139 (Rev. Bd. 1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

Midyear 1986 Access Tariff Filings
Centel Telephone Companies
Petition for Waiver

MEMORANDUM OPINION AND ORDER

Adopted: October 7, 1988; Released: October 28, 1988

By the Chief, Common Carrier Bureau:

1. On July 28, 1988, the Centel Telephone Companies (Centel) filed a petition for waiver of that portion of the Commission's Order, Midyear 1986 Access Tariff Filings, 1 FCC Rcd 1247 (1986) (December 19 Order) directing the local exchange carriers (LECs) to provide originating WATS access lines (WALs) with Feature Group A (FGA) and Feature Group B (FGB) service. A number of carriers, including Centel, were granted waivers of this requirement. All such waivers expired on August 1, 1987.[1] Ameritech, BellSouth, and Pacific Bell were granted one year extensions of these waivers on July 28, 1988.[2] The instant waiver request is similar to Centel's previous request, and is unopposed. For the reasons set forth below, we will grant Centel an additional one-year waiver.

2. In the December 19 Order, the Commission determined that carriers may not refuse to provide WALs in connection with FGA and FGB services. December 19 Order, 1 FCC Rcd at 1250. In January 1987, a number of LECs filed petitions for clarification of that Order.[3] Ameritech, for example, argued that requiring the provision of originating WALs in connection with FGA and FGB was unnecessary because any interexchange carrier (IC) wishing to provide WATS service to customers served by nonconforming offices can use WATS access line extensions (WALEs) to connect those customers to offices with equal access capability. Moreover, Ameritech stated, the charge for those extensions is waived whenever WALEs would be required by an IC but not by AT&T. The Bureau denied the petitions for clarification but waived until August 1, 1987, the obligation by the LECs to provide originating WATS access in connection with FGA and FGB.[4]

3. Soon thereafter, these same LECs, with the addition of Centel, filed requests for an indefinite continuation of these waivers based on the asserted high cost of compliance and the lack of IC demand for the service. The Bureau declined to grant the requests for indefinite waivers, stating that grant of such waivers would be inconsistent with the service requirements established in the Commission's December 19 Order, and that "[a] permanent waiver would not be appropriate in these circumstances because such a waiver would in fact rescind a Commission order."[5]

4. Centel again seeks to have this waiver extended indefinitely. According to Centel, it would be forced to make modifications to its billing and network switching systems in order to provide originating WALs in connection with FGA and FGB. Centel Petition at 2. Moreover, Centel asserts that there continues to be no demand for the service and that, with the conversion of offices to equal access, there should be no demand for the service in the future. *Id.* at 3. According to Centel, 73 percent of its access lines are presently served by equal access end offices and that figure should reach 90 percent by the end of 1990. *Id.* Finally, Centel states that it offers the same WATS access in non-converted offices to carriers other than AT&T, by extending a WALE from the converted office to the non-converted office. Centel maintains that this provides service to the carrier through an equal access office. Centel waives the charges for these WALEs. Id. at 1.

5. This waiver request is similar to those filed by the LECs in 1987 and in 1988. As there continues to be no demand for the service at issue and the costs of providing the service are not insignificant, we conclude that a one-year extension of Centel's waiver is warranted. We also conclude that granting an indefinite waiver would defeat the purpose of the Commission's December 19 Order. Until such time as that Order is modified to eliminate this service requirement, an indefinite waiver cannot be granted.

6. Accordingly, IT IS ORDERED that the petition for waiver filed by the Centel Telephone Companies IS GRANTED to the extent indicated herein and otherwise IS DENIED.

7. IT IS FURTHER ORDERED that the waiver granted by this Order expires on August 1, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Ameritech Operating Companies, Tariff F.C.C. No. 2, Petitions for Indefinite Waiver, 2 FCC Rcd 4544 (1987) (Ameritech Order I) [waiver granted to the Ameritech Operating Companies (Ameritech), Pacific Bell, the BellSouth Telephone Companies (BellSouth), and GTE Telephone Operating Companies (GTOC)]; Centel Telephone Companies, Tariff F.C.C. No. 1, 2 FCC Rcd 5257 (1987) (Centel Order) (waiver granted to Centel and the Bell Atlantic Telephone Companies).

[2] Midyear 1986 Access Tariff Filings, Petitions for Waiver, DA 88-1201, released July 29, 1988 (Ameritech Order II).

[3] Ameritech, GTOC, BellSouth, Pacific Bell, and Bell Atlantic filed petitions for waivers.

[4] Midyear 1986 Access Tariff Filings, Ameritech Petition for Clarification of December 19 Order, Ameritech Services Tariff F.C.C. No. 2, Mimeo No. 1955, released Feb. 17, 1987.

[5] Ameritech Order II, 2 FCC Rcd at 4545; Centel Order, 2 FCC Rcd at 5257.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-37

In the Matter of

Amendment of Parts 13 and 80 of the Rules concerning ship radio officer qualifying service endorsements.

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 14, 1988; Released: October 31, 1988

By the Commission:

I. INTRODUCTION

1. By a *Notice of Proposed Rule Making* (*NPRM*), 3 FCC Rcd 732 (1988), the Commission proposed to amend those sections of Part 13 (Commercial Radio Operators) and Part 80 (Stations in the Maritime Services) of the Rules, 47 C.F.R. Parts 13 and 80, that relate to the requirements for the ship radio officer qualifying service endorsements. Additionally, the *NPRM* proposed to clarify and simplify the Commission's policy regarding the criteria for the issuance of the radio officer qualifying service endorsement. This *Report and Order* adopts the proposed rule amendments.

II. BACKGROUND

2. Part II of Title III (Radio Equipment and Radio Operators on Board Ship) of the Communications Act of 1934, as amended (Act) requires large ocean-going ships to carry certain types of radio equipment and personnel for safety purposes. Cargo ships of 300 to 1600 gross tons that do not have a radiotelegraph station on board must be equipped with a radiotelephone station, 47 U.S.C. § 351(a)(1)(B). Passenger ships irrespective of size and cargo ships of 1600 gross tons and over must be equipped with a radiotelegraph station and carry at least two radio officers, 47 U.S.C. §§ 351(a)(1)(A) and 353(a). However, Section 353(b) of the Act permits cargo ships that are equipped with a radiotelegraph auto alarm to carry a single radio officer who has at least six months previous service as a radio officer on board a ship or ships of the United States.[1]

3. Section 3(z)(1) of the Act, 47 U.S.C. § 153(z)(1), defines a radio officer as a person holding at least a first or second class radiotelegraph operator's license issued by the Commission. When such a person is employed to operate a radiotelegraph station on board a U.S. ship, a radio officer license issued by the U.S. Coast Guard is also required. In order to serve as the sole radio officer on board a cargo ship under the provisions of Section 353(b), a radio officer must have a six months service endorsement on the radiotelegraph license issued by the Commission. Under the Commission's current Rules and policies an applicant for a six months service endorsement must document satisfactory service:

(a) as a radio officer;

(b) on board a ship or ships of the United States;

(c) with a radiotelegraph station that complied with Part II of Title III of the Act;

(d) for a combined period of at least six months (180 days, 8 hours per day totaling at least 1440 hours);

(e) while holding both a valid FCC first or second class radiotelegraph operator's certificate; and

(f) a radio officer license issued by the Coast Guard (Coast Guard U.S. Merchant Marine Officer License).

All six of these prerequisites must occur simultaneously.[2]

4. As we stated in the NPRM, we have received a number of inquiries and complaints concerning the difficulties encountered by radio officers attempting to obtain the six months service endorsement. Generally, two problem areas are raised. The first relates to the requirement that an applicant for the six months service endorsement possess a Coast Guard radio officer license during the entire six month qualifying period. The second concerns the methods used to define and document the six month qualifying period. It is argued that the showings that are currently required are an overly restrictive interpretation of the Act and Rules. Many otherwise qualified radio operators who have served on United States Navy, Coast Guard or other Government owned or operated ships, or who have undergone special training programs at sea nevertheless do not qualify for the six months service endorsement. In fact, since 1982 only 50 six months service endorsements have been issued.

III. PROPOSAL

5. Because we believed the current rule requirements are unnecessarily restrictive, we reviewed the requirements and procedures used to determine that radio officers have the six months previous service mandated by Section 353(b) of the Act. As a part of this review, we carefully examined the history of Sections 353(b) and 3(z)(1) of the Act. We tentatively concluded that the Act does not require an applicant to simultaneously comply with all six of the existing requirements listed above. On the contrary, we stated that Section 353(b) requires a radiotelegraph operator to satisfy only *three* prerequisites to work as the sole radio officer on board a cargo ship: (1) six months previous service, (2) as a radio officer, and (3) on board U.S. ships. We based this tentative conclusion on the fact that nothing in the Act, nor its legislative history, appeared to require that the six months service be computed in any particular way or that the service must have been performed on a radiotelegraph ship. *See NPRM supra* at paragraph 13.

6. As a result of this review, we proposed the following specific changes or clarifications in the *NPRM*. First an applicant for the six months service endorsement must have served as a *radio* operator but not necessarily as a

radiotelegraph operator for six months. Second, the ship or ships on which the service was performed would be required *either* to be equipped with a radio station that complies with the provisions of Part II of Title III of the Act *or* to be operated by the United States Government, permitting service on radiotelephone equipped ships and Navy or Coast Guard ships to qualify. Third, in lieu of the current 1440 hour requirement, we proposed that the time that a ship was in port or at anchor, which did not exceed seven days, would be credited toward the aggregate six months qualifying period. Fourth, the applicant would have to hold a first or second class radiotelegraph operator's certificate during the entire six month qualifying period in order to meet the definition of a radio officer contained in the Act. Fifth, an applicant would be permitted to hold a radio officer's license issued by the Coast Guard at the time the six months endorsement is requested, rather than being required to hold it throughout the six months qualifying period. Sixth, a ship station licensee (owner/operator), master or commanding officer would be permitted to certify that the applicant performed the duties of a radio operator in a satisfactory manner during the period involved. Lastly, we proposed to amend the definition of the term "radio officer" in Section 80.157 of our Rules, 47 C.F.R. § 80.157, to conform it to the definition of the term in the Act.

7. In addition to these specific proposals, we also invited comments on two other matters. First we sought comments on whether the Rules should be further relaxed to permit time spent in classroom or other training programs when the in-port period exceeds seven days to be credited toward the six months aggregate service. Second, we sought comments on whether ship station licensees, masters, commanding officers or even independent entities should be permitted to issue a certification of six months qualifying service without the need for a license endorsement by the Commission.

IV. COMMENTS/DISCUSSION

8. Numerous comments and reply comments were received in response to the *NPRM* from all segments of the maritime community including labor organizations, ship owners and operators, management companies, trade associations and individuals. (*See* Appendix B for the List of Commenters.) Generally, ship owners, operators, agents, and other industry groups and some labor interests strongly supported the changes. Two radio officers unions and a number of individual radio officers strongly opposed most of the proposed changes. The comments on our specific proposals are discussed in detail below.

A. Service as a Radio Operator on Radiotelephone Ships and U. S. Government Ships

9. Our first and second proposals to credit service on radiotelephone equipped ships and U.S. government owned ships were strongly supported by the American Institute of Merchant Shipping (AIMS), Joseph Dinsmore Murphy on behalf of the American Maritime Officers Service (Murphy), the Marine Engineers Benevolent Association-Associated Maritime Officers (MEBA), and a number of ship owners and management organizations. These proposals, however, were opposed by the American Radio Association and the Radio Officers Union (ARA/ROU). The position of the ARA/ROU was supported in the comments of a number of radio officers.

10. The ARA/ROU objection to crediting service on radiotelephone ships and U.S. government owned ships rests upon the assertion that the Act permits only service on radio *telegraph* ships to be counted for purposes of the six months endorsement. The ARA/ROU argue that because Section 353(b) prescribes the radio officer requirements for radiotelegraph ships, this necessarily means that the qualifying experience must be on a radiotelegraph ship. ARA/ROU Comments at 9-10. ARA/ROU insists that only six months service under the supervision of a qualified radiotelegraph operator can properly qualify a radio officer. In support of this contention, ARA/ROU state: "It should . . . be noted that ships under 1600 gross tons do not carry radio officers that are subject to the six months service endorsements . . . and service thereon does not provide the experience necessary for safety at sea . . . ." ARA/ROU Comments at 5-6.

11. On the other hand, LSC Marine, Pacific-Gulf Marine, Interocean Management, Ocean Shipholdings, and AIMS comment that basic radio operator duties on board these radiotelephone vessels are essentially the same as on larger ships, that many of these vessels are commonly engaged in ocean transit, and that only the absence of a radiotelegraph station on board differentiates the duties of radio personnel performed. They point out the Commission's proposal will continue to require possession of an FCC first or second class radiotelegraph operator's certificate by an applicant, both to obtain an endorsement and during the entire period of qualifying service. *See also*, Murphy Reply Comments at 5-6.

12. After careful consideration of the comments and the requirements of the Act, we adopt our proposal to amend Section 13.12(b)(2)(i) of the Rules to allow six months as a radio operator to satisfy the requirement of the six months service endorsement. Initially we note that the Act itself only generally indicates what experience is required. Section 353(b) of the Act states that the sole radio officer aboard a cargo ship "shall have had at least six months' previous service in the aggregate as a *radio officer* in a *station* on board a ship or ships of the United States." (emphasis added). This provision speaks of service in a *station*. It does not differentiate between radiotelephone and radiotelegraph stations. We find the absence of this specification indicative of the basic purpose of Section 353 of the Act.

13. Section 353 of the Act assures that vessels of the United States conform to the requirements of the International Safety of Life at Sea Convention. [3] The basic premise of this agreement is that every ship at sea is a lifeboat for other ships. Accordingly, every ship must *monitor continuously* the 500 kHz international distress frequency and come to the assistance of any nearby vessel in distress. Thus Section 353(a) requires that any cargo ship that is not equipped with a radiotelegraph alarm carry at least two radio officers so that a continuous watch can be maintained on the distress channel, as set forth in Section 353(c). Section 353(b) provides that only a single radio operator is required for a ship equipped with an radiotelegraph auto alarm because such equipment maintains a continuous watch on the distress channel.[4] We note that Section 353(a) does not require the two radio operators to have *any experience on a ship* in actual service. Therefore, Congress must have viewed the Commission's radiotelegraph operators' licensing requirements as sufficient to demonstrate radiotelegraph operating proficiency.[5]

14. The legislative history of the enactment of Section 353(b) in 1937 provides no additional insight into Congress' intent. The history of subsequent legislation that amended Section 353(b) to permit the FCC to suspend the six months previous service requirement during World War II, however, illustrates the diverse views of concerned maritime interests in respect to this requirement. For example, the testimony of Mr. Francis B. Walker, representing the American Merchant Marine Institute before the House of Representatives Merchant Marine and Fisheries Committee in support of this emergency measure, stated:

> Prior to 1937--when the 6 months' rule was adopted--there was no requirement of sea service as an operator. The only reasonable argument in support of this rule is that a man should find his sea legs before he is responsible alone.[6]

Mr. Paul Sharrenberg, Legislative Representative, American Federation of Labor, appearing in opposition to the legislation observed:

> Now, the crux of this situation, as I see it, as an old seaman, is the question of acquiring sea legs. It may be taken for granted by everyone that you can create a highly efficient radio officer ashore, but there has been no method devised whereby you can put sea legs on a man to make him really useful aboard ship, unless you put him there, and have him go through the ceremony of serving on board a ship at sea. It was for that reason that the Congress of the United States, in 1915 created certain minimum standards of efficiency for able seamen. Prior to that time a shoemaker, or even a Congressman could sign as an able seaman, even though he had never been to sea before in his lifetime.[7]

Other commenters believed that beyond a radiotelegraphy operator acquiring his "sea legs," it was important that he also get experience operating telegraphy equipment at sea. Because these statements are from members of the regulated industry and government officials after the enactment of Section 353(b), they fail to successfully resolve the statute's ambiguity. Nevertheless, these comments do demonstrate that at least some knowledgeable members of the maritime community considered the six months service requirement to be concerned with general experience on board ships rather than technical training.

15. Thus, in light of Section 353(b)'s ambiguity and in light of the express language in Section 353(b) stating that the requirements contained there have been enacted "for safety purposes," this Commission may reasonably interpret the Act such that safety standards are maintained, while at the same time recognizing that six months of experience at sea with various forms of maritime communications meets the service requirement of the Act. We conclude that those goals are attained if we treat the six months experience requirement as a demonstration of "seamanship."

16. We do not believe it is important to focus on actual telegraphy experience at sea. Our license requirements adequately assure that all persons serving as radio officers will have the necessary Morse code capability. In addition, in recent years, reliance on manual Morse radiotelegraphy for transmission of shipboard messages, including emergency messages, has greatly diminished as new means of communication have become reliable, faster, and more common. These newer means of communication include radiotelephony in various bands, telex and facsimile communications and the use of maritime satellite communications. For example, many ships today utilize satellite or narrow-band direct-printing equipment as the primary mode of communication at sea. Further, besides the required watch on a telegraphy frequency (500 kHz), large ocean-going ships now must maintain a listening watch on telephony frequencies (2182 kHz and 156.800 MHz). These same types of considerations apply to Navy, Coast Guard, and other Government-owned and operated ships. Thus, if radio communications are needed in an emergency, there are always some means available.

17. At the same time, the Act requires that ships be staffed with individuals who are capable of functioning at sea. Therefore, we are interpreting Section 353(b)'s six months service requirement as a means of assuring that, before an individual is given the sole responsibility of operating a radiotelegraph station, the individual can generally physically function while at sea. Any type of communications experience on a vessel will demonstrate that ability. As the commenters pointed out, radiotelephone operators on ocean-going ships accumulate sufficient shipboard experience. These ships, between 300 and 1600 gross tons in size, sail throughout the world. The radio operator must be familiar with operational practices and procedures as well as applicable publications such as the International Telecommunications Union's List of Coast Stations and List of Ship Stations. Radio operators on board such radiotelephone equipped ships are skilled and knowledgeable maritime communicators. In fact, the experience with radiotelephone and satellite data equipment may be far more useful and contribute to the safety of the vessel far more than radiotelegraph experience.[8]

18. Accordingly, we conclude that an applicant for a six months endorsement who has served on board radiotelephone, radiotelegraph or U.S. Government ships for six months as a radio operator while possessing an FCC first or second class radiotelegraph operator's certificate, have the required experience to fulfill the safety duties of a merchant ship radio officer. This view is strongly supported in comments submitted by: Sealift, Inc., Pacific-Gulf Marine, Interocean Management, LSC Marine, Seahawk Management, and AIMS. *See* AIMS reply comments at 4-5. Therefore, we find that service on radiotelephone equipped ships and U.S. Government owned ships qualifies for the six months service endorsement. There is no reason that any one method of determining qualifying service should be frozen in time, excluding otherwise qualified radio operators from obtaining the service endorsement. We do not believe that the regulatory burdens now incorporated in the rules for the six months endorsement result in any significant increase in safety.

B. ***Computation of Six Months Service***

19. We next inquired concerning the degree to which in port, classroom or training time should be counted toward qualifying service. It is currently excluded in its entirety. We tentatively concluded that the six months requirement could be satisfied by a simple longevity test and that six months total service on an operational ship was sufficient to ensure that a radio operator had the requisite sea experience. To ensure the ship on which the experience was gained was in fact operational, we proposed to limit

in port time between voyages to a seven day maximum. The ARA/ROU urge that only a one time seven day in port period be counted and that classroom and on shore training time not be counted because they do not adequately duplicate conditions at sea. ARA/ROU Comments at 5, 10. AIMS also supports the exclusion of classroom time as a substitute for experience. AIMS observes that "it would be overly burdensome to begin approval of courses and the administrative oversight that entails for the limited application here." AIMS Comments at 3. On balance, we concur with the commenters with regard to classroom training and will not include any classroom or training time.

20. Several commenters suggested that the period of creditable service should be extended beyond seven days while in port when watches are maintained or the vessel is otherwise kept in a state of full readiness. Murphy Reply Comments at 7. We proposed the seven day in port limitation for two reasons: (1) to apply a simpler, more practical measure of the six months requirement, but (2) to ensure that extended in port stays, such as periods the ship is in dry dock, are not counted. We believe that limiting the in port periods to seven days is a reasonable compromise among the various points of view presented in this proceeding while assuring that extended non-operational periods are not counted. The ARA/ROU did not supply reasons why only one seven day period should be counted. Counting unlimited time in port on the other hand, even if the station is operational, does not adequately duplicate service at sea. For these reasons we are permitting all in port periods of seven days or less between voyages to count toward qualifying service as proposed.

C. *FCC Operator's Certificate*

21. The proposed rules retained the requirement for holding the required first or second class radiotelegraph operator's certificate throughout the six months period. AIMS, the only commenter on this issue, suggested it is not necessary to require that the operator hold a first or second class radiotelegraph operator's certificate during the entire six month qualifying period. AIMS Comments at 3-4. This requirement cannot be relaxed, however, because the Act, by definition, requires the certificate to be held in order for the service to be counted as service as a radio officer on board a ship or ships of the United States. *See* 47 U.S.C. §§ 153(Z)(1) and 353(b).

D. *Coast Guard Radio Officer License*

22. In the *NPRM*, we proposed to remove the current requirement that a radio operator hold a Coast Guard Radio Officer License *throughout* the six months qualifying period. The Coast Guard's Rules, 46 C.F.R. § 10.13-1 *et seq.*, require an applicant for a Coast Guard radio officer's license to hold an FCC first or second class radiotelegraph operator's certificate and to meet certain age, citizenship and character requirements. These provisions classify radiotelegraph operators as licensed officers for merchant marine manning purposes. Neither the Act nor public safety seem to require an applicant who is undergoing training for the qualifying service endorsement to have a Coast Guard radio officer license for the entire six months period. None of the comments addressed this issue. Consequently, we are adopting that provision as proposed for the reasons stated in the *NPRM*, namely that the Coast Guard license merely attests to the officer's good character and his status on board ship. It has nothing to do with his technical or operational competence which is certified by this Commission.

E. *Certification by Ship Licensee or Master*

23. We proposed to permit ship owners and operators, masters or commanding officers to certify that an applicant has satisfactorily performed six months service as a radio operator. Murphy and several ship owners and operators strongly supported this rule amendment. They argue that companies will faithfully ensure compliance with the new requirement out of concern for safety and high quality operational communications. Murphy also points out that the Commission would not abandon oversight of its responsibility in this field and could satisfy itself, through appropriate procedures, that these certifications are not being improperly given. Murphy Reply Comments at 7-8. The ARA/ROU argued that the Commission "can't give up its responsibility to require proof." ARA/ROU Comments at 8.

24. We agree with the ARA/ROU that proof of satisfactory performance is necessary but it need not take the mechanistic form it has in the past. As we stated in the *NPRM*, we believe owners, operators, masters and commanding officers have strong incentives to verify the competency of these officers in order to ensure they will have qualified people as radio operators. Safety, legal and economic considerations involved in the operation of large ocean-going ships combine to ensure these parties will act responsibly. There is no evidence cited in the comments which would lead us to conclude that such certification would be made in bad faith. Even if such an instance were to occur, we are retaining authority to issue the six months service endorsement, as discussed below, and can investigate on a case-by-case basis where warranted.[9] Further, similar to current practice, we will investigate at random a number of such six months service certifications to sample compliance with the new requirements. Accordingly, we are adopting the rule as proposed.

25. We also inquired whether we should permit ship owners and operators, masters, commanding officers or independent entities to issue the six months endorsement themselves. The ARA/ROU commented that the Commission should continue to issue the six months endorsement, rather than attempting to delegate this function to third parties. The ARA/ROU argued that this function is consistent with the Commission's statutory mandate to foster safety. ARA/ROU argue that it is not unduly burdensome to do so and that the effort expended in qualifying and overseeing third party endorsers would be equally, if not more, burdensome and costly for the Commission and might impose additional costs on applicants. ARA/ROU comments at 10-11. AIMS also recommended that we not delegate this function. AIMS stated that oversight of such a program would equal or exceed the current Commission efforts in issuing the endorsements itself. AIMS also commented that other government programs authorizing private certification which were mentioned in the *NPRM*, for example, the Federal Aviation Administration's authorization of private examiners to conduct flight tests, are very large programs requiring considerable agency oversight to ensure quality control.

26. We agree with these commenters that the Commission should not initiate a program to permit private entities to issue the six months endorsement. Since 1982, only 50 six months endorsements have been issued by the

Commission. In light of this small number, it seems probable that the effort to implement and oversee such a program would equal or exceed the burden on the Commission in issuing the endorsement itself.

27. Finally, one commenter supported our proposal to conform the definition of the term "radio officer" to the definition of that term in the Act. AIMS comments at 4. No commenter opposed the proposed definition. Consequently, we are adopting the definition as proposed.

V. CONCLUSION

28. For the reasons set forth above, we conclude the rules should be amended as proposed. These new rules will simplify the process of obtaining the six months endorsement without compromising safety.

29. In accordance with Section 605(b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b), the Commission certifies that these Rules will not have a significant economic impact on a substantial number of small entities. The Rules relax the six months qualifying service certification procedures applicable to radiotelegraph operators seeking to serve as radio officers on large ocean-going ships. Since 1982 the Commission has issued 50 six months endorsements.

30. The Rule amendments adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to decrease the information collection burden the Commission imposes on the public. This reduction in information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

31. The authority for this action is contained in 47 U.S.C. §§ 154(i) and 303(l) and (r).

32. Accordingly, IT IS ORDERED that the Commission's Rules ARE AMENDED as set forth in Appendix A below, effective **December 15, 1988.**

33. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parts 13 and 80 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

A. Part 13 - Commercial Radio Operators

1. The authority citation for Part 13 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. In Section 13.12, paragraph (b) is revised to read as follows:

§ 13.12 Additional requirements for first class radiotelegraph operator's certificate and six months service endorsement.

* * * * *

(b) * * *

(1) * * *

(2) To qualify for the six months service endorsement the applicant must show that:

(i) the applicant was employed as a radio operator on board ships of the United States for a period totaling at least six months;

(ii) the ships were equipped with a radio station complying with the provisions of Part II of Title III of the Communications Act, or the ships were owned and operated by the U.S. Government, for example the U.S. Navy or U.S. Coast Guard, and equipped with radio stations;

(iii) the ships were in service during the applicable six month period; however, any portion of single in port periods that exceed seven days must be excluded from the qualifying six months period;

(iv) the applicant held a first or second class radiotelegraph operator's certificate issued by the FCC during this entire six month qualifying period; and

(v) the applicant holds a radio officer's license issued by the U.S. Coast Guard at the time the six month service endorsement is requested.

(3) To satisfy the showing required in paragraph (b)(2) above, the applicant must submit documents signed by the ship station licensees, masters or commanding officers of U.S. ships stating that the applicant performed the duties of a radio operator in a satisfactory manner under each of the conditions listed in paragraph (b)(2).

* * * * *

B. Part 80 - Stations in the Maritime Services

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. Section 80.157 is revised to read as follows:

§ 80.157 Radio Officer defined.

A "radio officer" means a person holding a first or second class radiotelegraph operator's certificate issued by the Commission who is employed to operate a ship radio station in compliance with Part II of Title III of the

Communications Act. Such a person is also required to be licensed as a "radio officer" by the U.S. Coast Guard when employed to operate a ship radio *telegraph* station.

APPENDIX B

List of Commenters

American Radio Association and Radio Officers Union (Joint Comments)

The American Institute of Merchant Shipping

American Maritime Officers Service

George L. Hale, Atlantic Council, Radio Officers Union

Carl W. Gibbs

Gregory F. Bell

Frank C. Allred

Jack N. Whipkey

James R. Warren

Seahawk Management, Inc.

LSC Marine Inc.

Interocean Management Corp.

Transoceanic Cable Ship Co.

Bay Tankers, Inc.

District 2 - Marine Engineers Beneficial Assn - Associated Maritime Officers

Transportation Institute

Dyn Corp.

Sealift, Inc.

Pacific - Gulf Marine Inc.

American Overseas Marine Corp.

Ocean Shipholdings, Inc.

OB

FOOTNOTES

[1] Section 353(b), 47 U.S.C. § 353(b) provides: "A cargo ship which in accordance with this part is equipped with a radiotelegraph station, which is equipped with a radiotelegraph auto alarm, shall, for safety purposes, carry at least one radio officer who shall have had at least *six months' previous service in the aggregate* as a radio officer in a station on board a ship or ships of the United States." (Emphasis added.)

[2] *See* Section 13.12(b) of the Rules, 47 C.F.R. § 13.12(b) and FCC Field Operation's Bureau Bulletin FO-7 titled "Radiotelegraph Operator's Certificates" (March 1987).

[3] Safety of Life at Sea Convention, 1974, TIAS 9700.

[4] In this instance, Section 353(c) requires a manned watch of at least eight hours per day in the aggregate on a cargo ship where only a single operator is required.

[5] Section 3(z)(1) of the Act defines a "radio officer" as "a person holding at least a first or second class radiotelegraph operators license as prescribed and issed by the Commission." Thus regardless of the experience requirement, an applicant for the service endorsement must already hold a radiotelegraph operators' license and thus be proficient as a radiotelegraph operator.

[6] Hearing on H.R. 2074, Before the House of Representatives Merchant Marine and Fisheries Committee, 77th Cong., 1st Sess. 8 (1941). Similar diverse views can be found in the Hearing on H.R. 8251, before the same committee, 75th Cong., 1st Sess 7 (1938) wherein Congress considered a proposal to repeal Section 353(b).

[7] *Id.* at 19.

[8] Even assuming there is no legal bar to counting service on radiotelephone ships or U.S. government owned ships, the ARA/ROU and some radio officers commented that it is not appropriate to do so because there is no shortage of qualified radiotelegraph officers. There was sharp disagreement in the comments concerning the extent to which there is or will be a shortage of qualified radio officers. The ARA/ROU insists that 92% of the United States maritime industry is served by ARA/ROU members and that there is no manpower shortage of any kind (ARA/ROU Reply Comments at 3). Other commenters, however, state that there is a shortage of qualified radio officers. *See* Interocean Management Corp. (Comment at 1) noting a nearly 50% decrease in the number of ARA/ROU members between 1980 and 1985-86; LSC Marine, Inc. (Comment at 1) citing company delays in meeting schedules awaiting radio officers; and Murphy (Reply Comments at 3-4) citing other commenters remarking on the severe shortage of radio officers they have experienced. We need not, however, resolve this factual dispute. The issue is not the supply of qualified radio officers, but the statutory requirements of qualifying service.

[9] Sanctions for willful false statements could be imposed under Section 1001 of Title 18 of the U.S. Code, 18 U.S.C. § 1001 (10,000 fine/5 years imprisonment), under Section 303(m)(1)(A) of the Communications Act, 47 U.S.C. § 303(m)(1)(A) (suspension of operator license) 47 U.S.C. § 386(a)(b) (forfeiture of 500 by a vessel or 100 by a master).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB COMMUNICATIONS GROUP, INC. File No. CSG-88-011-ML

Application for modification of its authority for its 11.3-meter, 4/6 GHz international earth station at Culver City, California

IDB COMMUNICATIONS GROUP, INC. File No. CSG-88-029-ML

Application for modification of its authority for its 9.2-meter, 4/6 GHz international earth station at Staten Island, New York

ORDER AND AUTHORIZATION

Adopted: September 30, 1988; Released: October 28, 1988

By the Chief, International Facilities Division:

1. On December 4, 1987, IDB Communications Group, Inc. (IDB) filed an application, File No. CSG-88-011-ML requesting modification of the authorization[1] for one of its Culver City, California earth stations to:

(a) permit IDB to provide Single Channel Per Carrier (SCPC) audio service in addition to the INTELSAT Business Services (IBS) and International Television service previously authorized; and

(b) provide service via INTELSAT satellites between this Culver City earth station and earth stations located in the non-contiguous United States.[2]

The application was placed on public notice on December 31, 1987. On February 9, 1988, the application was amended to make minor technical changes.

2. On February 1, 1988, GTE Spacenet Corporation (GTE) petitioned to deny this application to the extent that authority is sought to use INTELSAT space segment to provide services between the Culver City earth station and earth stations in the non-contiguous U.S. Pan American Satellite (PAS) filed comments pertaining to the application on February 1, 1988. On February 16, 1988, IDB filed an Opposition to Petition to Deny and Reply to Comments. IDB noted that its request for authority to provide SCPC audio service was not opposed and requested immediate grant of that portion of the application. On February 26, 1988, PAS filed a reply to IDB's opposition. GTE filed its reply comments on February 29, 1988. All of the pleadings address only IDB's request for authority to provide service via INTELSAT satellites between the subject Culver City, California earth station and earth stations located in the non-contiguous United States.

3. On February 12, 1988, IDB filed an application, File No. CSG-88-029-ML, requesting that its authorization [3] for one of its earth stations at Staten Island, New York be modified to permit it to:

(a) provide International Television Service and SCPC audio services in addition to the IBS previously authorized; and

(b) provide service via INTELSAT satellites between this Staten Island, New York earth station and earth stations located in the non-contiguous United States.[4]

The application was placed on public notice on March 9, 1988.

4. GTE petitioned to deny this application to the extent that authority is sought to use INTELSAT space segment to provide services between the subject Staten Island, New York earth station and earth stations in the non-contiguous United States. PAS filed comments pertaining to the application on the same day. On April 21, 1988, IDB filed an Opposition to Petition to Deny and Reply to Comments. IDB noted that its request for authority to provide SCPC audio services and international television service was not opposed and requested immediate grant of that portion of the application. The Communications Satellite Corporation (COMSAT) also filed an opposition to the GTE petition to deny on April 21, 1988. On May 3, 1988, GTE filed a Reply to Oppositions to Petition to Deny. All of the above pleadings address only IDB's request for authority to provide service via INTELSAT satellites between the subject Staten Island, New York earth station and earth stations located in the non-contiguous United States.

5. We shall not here address IDB's requests for authority to provide service via INTELSAT satellites between the subject Culver City, California and Staten Island, New York earth stations and earth stations located in the non-contiguous United States. Those IDB requests and the pleadings pertaining thereto will be considered in a future decision. Our consideration herein is limited solely to IDB's uncontested requests for authority to provide SCPC audio services from the subject Culver City, California and Staten Island, New York earth stations and international television service from the Staten Island New York earth station.

6. IDB is a common carrier pursuant to the Communications Act of 1934, as amended. It has previously been found to be legally, technically and financially qualified to construct and operate the subject Culver City, California and Staten Island, New York earth stations.[5] IDB has been granted authority to provide IBS, international television[6] and SCPC audio services between the United States and other countries.[7] IDB also has been granted authority to construct earth stations for the provision of international television service[8] and SCPC audio services.[9] IDB has completed the necessary frequency coordination for the additional services it requests authority to provide in the instant applications.

7. In view of the foregoing, we find that grant of IDB's requests to provide SCPC audio services from the subject Culver City, California and Staten Island, New York earth stations and international television service from said Staten Island, New York earth station will serve the public interest, convenience and necessity.

8. Accordingly, IT IS ORDERED, pursuant to Sections 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that applications File Nos. CSG-88-011-ML and CSG-88-029-ML ARE GRANTED IN PART and IDB is authorized[10] to:

(a) provide SCPC audio services from its 11.3 meter, 4/6 GHz earth station at Culver City, California and its 9.2-meter, 4/6 GHz earth station at Staten Island, New York;

(b) provide international television service from said Staten Island, New York earth station; and

(c) make the modifications to said earth stations necessary to provide these additional services.

9. IT IS FURTHER ORDERED that, upon completion of equipment installation and facility modification, IDB shall provide the Commission with a summary of the equipment actually installed.

10. IT IS FURTHER ORDERED that consideration of IDB's requests to provide service via INTELSAT satellites between the subject Culver City, California and Staten Island, New York earth stations and earth stations located in the non-contiguous United States is HEREBY DEFERRED.

11. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] IDB was authorized to construct and operate an 11.3-meter, 4/6 GHz earth station at Culver City, California, meeting INTELSAT Standard B technical parameters and communicating with Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) INTELSAT satellites, to provide INTELSAT Business Services (IBS) and television service. *See* O&A, IDB, Authorization to Construct, 2 FCC Rcd 6116 (1987).

[2] IDB's authorization for this earth station contains a footnote 6 which states:

> This authorization is not to be construed as permitting the provision of IBS and international television between earth stations located within the United States.

[3] IDB was authorized to construct and operate a transmit-only 9.2-meter, 4/6 GHz earth station at Staten Island, New York, meeting INTELSAT Standard F-3 technical parameters and communicating with AOR INTELSAT satellites, to provide IBS on one frequency. *See* O&A, IDB Authorization to Construct, 2 FCC Rcd 2229 (1987). IDB was subsequently authorized to modify the subject earth station to add full 6/4 GHz band transmit and receive operation. *See* IDB Communications Group, Inc. 2 FCC Rcd 7517 (1987).

[4] IDB's authorization for this earth station contains a footnote 5 which states:

> This authorization is not to be constructed as permitting the provision of IBS between earth stations located within the United States.

[5] *See* footnotes 1 and 3, *supra*.

[6] *See* MOO&A, IDB & Satellite Gateway, Int. Ext. of Lines, DA 88-412, 1 FCC Rcd 1367 (1986).

[7] *See* IDB Communications Group, Inc., File No. I-T-C-048, DA 88-1400, (released September 13, 1988).

[8] *See* footnote 1, *supra*.

[9] *See* O&A, IDB, Auth. to Construct, DA 87-1246, 2 FCC Rcd 5531 (1987).

[10] This authorization is not to be construed as permitting the provision of IBS, television service or SCPC audio services between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HRTC JOINT VENTURE — File No. CSG-88-031-ML

For modification of license of its domestic-fixed satellite earth station (call sign E880546) at East Lansing, Michigan for the provision of video, audio, data and teleconferencing services to points in the U.S., Canada and Mexico.

IDB COMMUNICATIONS GROUP, INC. — File No. CSG-88-081-ML

For modification of license of its transmit/receive earth station (call sign E7754) at Culver City, California to add a 5.5 meter 4/6 GHz earth station antenna for communication with points in the U.S., Canada and Mexico.

IDB COMMUNICATIONS GROUP, INC. — File No. CSG-88-082-ML

For modification of license of its transmit/receive earth station (call sign E7754) at Culver, City California to add a 7.0 meter 4/6 GHz antenna for communication with points in the U.S., Canada and Mexico.

CONOCO COMMUNICATIONS, INC. — File No. CSG-88-084-ML

For modification of license of its fixed transmit/receive earth station (call sign E88113) at Delisle, Mississippi, for communication with points in the U.S. and Mexico.

ERRATUM

Released: October 31, 1988

By the Chief, International Facilities Division:

1. The Commission's Order, released on October 18, 1988 (DA 88-1603) in the above-captioned matter did not include Attachments 1 and 2. The Order is hereby corrected to include Attachments 1 and 2 which are appended hereto.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XXII(d)

Satellites

*FEDEX A
*FEDEX B
GALAXY I
*GALAXY II
GALAXY III
*GALAXY IV
*GALAXY B
GSTAR I
GSTAR II
*GSTAR III
*COMSTAR III
COMSTAR D-4
*COMSAT GEN B
SPACENET I
*SPACENET II
SPACENET III
SATCOM IR
*SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
*SATCOM K-2
SBS V
SBS I
SBS II
SBS III
**SBS IV
TELSTAR 3A
TELSTAR 302
*TELSTAR 303
CONTEL ASC-I
CONTEL ASC-II
WESTAR IV
WESTAR V
*WESTAR B
*WESTAR (79° W)

* Consulted for Latin America/Caribbean services only.

** Consulted for Canada and Latin America/Caribbean services only.

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATION

Country	Service[s]	Satellite[s]
Anguilla	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Antigua and Barbuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Belize	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bermuda	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
British Virgin Islands	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus ANIK B, C1, C2, C3, D1 and D2
Cayman Islands	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1

Costa Rica	T.V. receive-only	all satellites listed in Attachment 1
Dominica	T.V., audio and data receive-only	all satellites listed in Attachment 1
Dominican Republic	T.V., audio and data receive-only	all satellites listed in Attachment 1
El Salvador	T.V. receive-only	all satellites listed in Attachment 1
Grenada	T.V., audio and data receive-only	all satellites listed in Attachment 1
Guatemala	T.V. and audio receive-only	all satellites listed in Attachment 1
Haiti	T.V., audio and data receive-only	all satellites listed in Attachment 1
Honduras	T.V. receive-only	all satellites listed in Attachment 1
Jamaica	T.V., audio and data receive-only (See note 3)	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Monsterrat	T.V., and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D4
Panama	T.V., audio and data receive-only	all satellites listed in Attachment 1

St. Christopher-Nevis	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Lucia	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Vincent and the Grenadines	T.V., audio and data receive-only	all satellites listed in Attachment 1
Trinidad and Tobago	T.V. receive-only	all Galaxy, Satcom, Westar and Comstar satellites listed in Attachment 1
Turks & Caicos	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) With the exception of Mexico and Canada, which were consulted separately, all services (i.e. T.V., audio and data receive-only) can be provided to any point over any of the satellites listed in Attachment 1 even through only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT and no additional consultation is needed.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-182

In the Matter of

Automated Reporting Requirements
for Certain Class A and Tier 1
Telephone Companies (Parts 31,
43, 67, and 69 of the FCC's Rules)

ORDER ON RECONSIDERATION

Adopted: October 4, 1988; Released: October 14, 1988

By the Commission:

I. INTRODUCTION

1. On September 17, 1987, we released an order[1] in the above-captioned docket establishing an automated system for collecting from local exchange carriers (LECs) the financial and operating data that we need to administer our accounting, joint cost, jurisdictional separations, rate base disallowance, rate of return, and access charge rules. Eight LECs seek clarification or reconsideration of numerous aspects of the *ARMIS Order* and of the reporting forms adopted therein. The Western Union Telegraph Company (Western Union) also petitions for reconsideration, asking that we collect additional statistical data that it believes necessary for analysis of interstate private line rates.[2]

2. In this *Order on Reconsideration* we address and resolve the major substantive and procedural issues raised by the parties. We grant in part and deny in part the petitions of the LECs, and we deny the petition of Western Union. We also amend Section 43.21 of our rules to improve the synchronization of the filing dates of the *ARMIS Order* reports. In addition, we direct the Common Carrier Bureau to resolve a number of technical issues raised by the parties concerning the design and format of the reporting forms, and to issue corrected forms according to a specified schedule.

II. BACKGROUND

3. Our system for regulating interstate access charges requires accurate identification of the costs and revenues associated with interstate access services. Towards this end, we have adopted a Uniform System of Accounts (USOA) and three sets of cost apportionment rules. The USOA, contained in Part 32 of our Rules, [3] prescribes the accounts that are used by the carriers for recording the costs and revenues of their regulated and nonregulated activities. Section 64.901 of our Rules[4] (Joint Cost Rules) provides general rules for the separation of regulated costs from the costs of nonregulated activities. Each carrier applies §64.901 in accordance with a cost allocation manual developed by the carrier and, in the case of a Tier 1 carrier, approved by this Commission.[5] Part 36 of our Rules, the Jurisdictional Separations Manual,[6] contains the rules for the apportionment between the intrastate and interstate regulatory jurisdictions of the regulated costs identified pursuant to §64.901. Finally, Part 69 of our Rules[7] provides for the apportionment among the access elements and the non-access category of the interstate costs identified by Part 36.

4. In the *ARMIS Order* we found that the scope and complexity of our regulatory responsibilities required that we reorganize and automate our system for collecting the financial and operating data needed to monitor the application of these rules. We stated that our intentions in adopting automated reporting requirements were to facilitate the timely and efficient analysis of revenue requirements and rate of return, to provide an improved basis for audit and other oversight functions, and to enhance our ability to quantify the effects of alternative regulatory proposals.[8]

5. We adopted four new reports.[9] The first is a quarterly report (*ARMIS Order*, Appendix A, hereinafter "Quarterly Report") of Parts 32, 64, 36, and 69 financial data on a highly aggregated basis. This report also includes a demand analysis table. The other three reports are annual and provide more detailed coverage. The Part 32 report (*ARMIS Order*, Appendix B, hereinafter "USOA Report") shows the results of the carriers' total activities on an account by account basis. The Part 64 report (*ARMIS Order*, Appendix C, hereinafter "Joint Cost Report") shows the allocation to regulated and nonregulated activities for the subset of accounts that are involved in the ratemaking process. The Parts 36 and 69 report (*ARMIS Order*, Appendix D, hereinafter "Access Report") shows the results of the jurisdictional separations and access charge rules, by Part 36 category and Part 69 element. We directed the Bureau to develop the additional reports which we would need to monitor the *Joint Cost Order* requirement that carriers allocate investment in telecommunications network plant on the basis of forecasts of relative regulated and nonregulated use.[10]

6. In their petitions for reconsideration, the LECs support the use of automated reports, but raise issues regarding the following matters: (1) reporting of revenue data; (2) reporting of rate of return calculations; (3) reporting of amounts assigned to the intrastate regulatory jurisdiction; (4) reporting of data on a study area basis; (5) proprietary treatment of certain information; (6) filing dates for certain reports; (7) elimination of redundant reporting forms; (8) frequency of reporting; and, (9) reporting the allocation of costs between regulated and nonregulated activities by allocation method. These issues are addressed in Part III, below. Western Union also supports automated reporting but seeks inclusion of additional statistical data in the reports. The Western Union petition is addressed in Part IV, below. In addition, parties call our attention to a number of technical problems that will require extensive, although for the most part minor, revisions to the report forms which we adopted in the *Order*. In Part V, below, we delegate resolution of these matters to the Bureau.

III. THE LEC PETITIONS

A. Reporting of Revenue Data

1. Introduction

7. Each of the ARMIS reports calls for reporting of revenue data. The USOA Report asks for revenue by account, on an annual, total company basis. The Joint Cost Rep asks for revenue by account, broken down between regulated and nonregulated activities.[11] The Access Report asks for revenue by jurisdictional separations category, for the state and interstate jurisdictions, and for the access elements.[12] The Quarterly Report asks for revenue data for four categories (access, local, toll, and miscellaneous), broken down by regulated and nonregulated activities, state and interstate jurisdictions, and the access elements.[13]

2. Pleadings of the parties

8. Bell Atlantic, USTA, and several other LECs object to the collection on the Quarterly Report of revenue data in the total company, nonregulated, and state columns, and to the collection of nonregulated revenue data on the Joint Cost Report. Bell Atlantic states that no federal regulatory purpose is served by requiring revenue data for nonregulated activities, state-regulated services, interstate services not subject to rate-of-return regulation, or for totals that include these items.[14] According to Bell Atlantic, the Quarterly Report should, therefore, include only access revenues, while all revenue data should be deleted from the Joint Cost Report.[15]

9. In support of its position, Bell Atlantic cites decisions in which this Commission has purportedly found such data to be unnecessary for rate of return[16] or tariff monitoring[17] purposes. Bell Atlantic argues that, in the absence of a subsequent finding that the data are needed for any other purpose, the data may not lawfully be required.[18] In addition, Bell Atlantic contends that the reporting of nonregulated revenue data is inconsistent with this Commission's own findings with respect to our authority over nonregulated activities. In this regard, Bell Atlantic quotes the following statement from the *Joint Cost Order* :

> The pricing of individual nonregulated products and services does not fall within our statutory mandate . . . . It is not our purpose, nor should it be our purpose, to seek to attribute costs to particular unregulated activities for the purpose of establishing a relationship between cost and price.[19] Bell Atlantic also argues that reporting of nonregulated revenues would place it at a competitive disadvantage and that it would be "entirely inconsistent with the Commission's deregulatory initiatives for the Commission to subject unregulated revenues to regulatory and public scrutiny."[20] Finally, Bell Atlantic contends that nonregulated revenue data cannot be justified as assisting the Commission in monitoring revenue allocations or assignments because revenues are not shared or allocated, but are instead directly assigned to either regulated or nonregulated products and services.

3. Discussion

10. We do not understand the LECs' arguments as denying our statutory authority to require the reporting of revenue data for aspects of a carrier's business that are not otherwise subject to our regulations.[21] No LEC, for example, challenges the inclusion of any revenue account on the USOA Report.[22] Rather, they argue that we cannot collect nonregulated revenue data[23] in the detail called for by the Quarterly Report and the Joint Cost Report because that data serves no regulatory purpose. They also argue that we should not collect it because it is proprietary. We disagree with both of these arguments; therefore, we decline to reconsider our revenue reporting requirements.

11. The LECs' argument that nonregulated revenue data serves no regulatory purpose rests on the assumption that revenue data is useful only for calculating rates of return. This assumption is mistaken and reflects an excessively narrow view of this Commission's role and responsibilities. The LECs' reliance on our previous decisions not to collect detailed revenue data for the purposes of rate of return monitoring and tariff review is, accordingly, misplaced.

12. Contrary to Bell Atlantic's assertions, nonregulated revenue data is useful and necessary for monitoring the application of our Joint Cost Rules. Although most revenues are directly assigned to either regulated or nonregulated activities, revenues do enter into the cost allocation process to the extent that they form the bases for certain allocations.[24]

13. It is certainly true that we have explicitly disavowed any intention to concern ourselves with the prices charged for individual nonregulated products and services. This intention is clearly reflected in the ARMIS reports, which call for nonregulated revenues to be reported at a level of aggregation such that the reported data cannot be used to establish a relationship between the cost and the price of any nonregulated product. However, we do have a regulatory interest in tracking the relationship between total nonregulated revenues and the total amounts of costs allocated to nonregulated activities. This ratio provides a basic check on the broad reasonableness of a company's cost allocations. Large amounts of nonregulated revenues accompanied by very few nonregulated costs, for example, would raise questions about whether all nonregulated costs were being captured. On the other hand, if a number of companies with similar mixes of nonregulated activities showed similar ratios of nonregulated revenues to nonregulated costs, then we would be reassured that their cost allocation techniques were sound. Accordingly, we find that collection of nonregulated revenue data at the levels of aggregation specified on the Quarterly Report and the Joint Cost Report is necessary if we are to fulfill our commitment to monitor the application of the Joint Cost Rules.

14. Furthermore, while only regulated revenue data are necessary for calculating the earned rates of return on interstate investment, revenue data for state and nonregulated operations are potentially important pieces of information in the determination of allowed rates of return. In the past we have found it unnecessary to allocate a carrier's cost of capital among state, interstate and nonregulated portions of its business. We have found that we can rely primarily upon financial market information, which relates to the carriers' total operations, to determine the rate of return required for interstate services. However, as carriers diversify and expand their nonregulated

operations, as state and interstate deregulatory initiatives are implemented, and as states pursue their own capital recovery policies, it will become increasingly important for us to understand how such changes will affect the interstate cost of capital. To do this will require data that are available only from the accounting and allocation systems of the carriers. While the revenue reporting requirements of the *ARMIS Order* do not, by any means, provide a complete picture of the carriers' state and nonregulated operations, we believe that they will be a valuable monitoring tool. Nonregulated revenue data, for example, provide a rough but important measure of the size of the nonregulated sector, and tracking these data over time will assist us in analyzing the impact of diversification on the company as a whole.

15. The LECs' argument that public knowledge of these data would place them at a disadvantage in the competitive marketplace is inapposite to the question whether we should require the data to be submitted. Under the provisions of the Freedom of Information Act, this Commission is authorized to withhold from public inspection confidential commercial and financial information which is submitted to us.[25] Our rules contain procedures through which such confidential treatment of data may be obtained.[26] We need not, therefore, limit the collection of data to that which are not competitively sensitive.

B. Rate of Return Calculations

1. Introduction

16. The Quarterly Report and the Joint Cost Report each contain a section entitled "Return Data." On each form, this section requests the following information: beginning net investment, ending net investment, average net investment, net return, rate of return, FCC ordered refund, net return including FCC refund, rate of return (including refund), and Universal Service Fund. Each of these items of information is required to be reported for every column on each of these forms.[27]

2. Pleadings of the Parties

17. The LECs believe that they should be required to report rate of return data only for the interstate services for which we prescribe a rate of return. BellSouth contends that reporting total company return on investment is a meaningless measure because it reflects the combined effect of both federal and state ratemaking on an investment basis determined solely in accordance with federal ratemaking policy.[28] Similarly, USTA contends that calculating a rate of return in the "state" column would be misleading because such a rate of return would be determined on a basis which is different from the bases actually used for intrastate ratemaking purposes. Contel generally argues that the calculation of return for non-rate-base regulated services yields superfluous and misleading results.[29] GTE states that, since the Commission has never stated a requirement for rate of return data for nonregulated operations, it intends to mark the spaces provided for such information "N/A".[30] The companies also argue that disclosure of return data for services which are not federally regulated would place them in a competitively disadvantageous position.[31]

3. Discussion

18. For the reasons given by the parties, we agree that the display of rate of return calculations for services and activities for which we do not prescribe a rate of return could be misleading and confusing. We do not agree that the calculation of a rate of return for total interstate should be deleted. We believe that a rate of return on total interstate activity is a useful summary number and that the small amount of non-access costs included in the total interstate column does not significantly reduce the relevancy of the return calculation called for in the Quarterly Report. We therefore direct the Bureau to change the Quarterly Report so that rates of return are reported only in total interstate and the interstate access columns and to remove all rate of return data from the Joint Cost Report.[32] Upon review however, we have found that we have inadvertently omitted the rate of return data from the Access Report. We direct our staff to revise the Access Report to include the rate of return data.

C. Reporting of Amounts Assigned to the Intrastate Jurisdiction

1. Introduction

19. The Quarterly Report and the Access Report each contain a column for state data. Carriers are to report in this column the costs and revenues which are assigned to the intrastate regulatory jurisdiction through the application of Part 36.

2. Pleadings of the Parties

20. The LECs object strenuously to the inclusion in the reports of a "state" column.[33] They contend that, because the costs and revenues actually used by states in setting rates may differ from the amounts assigned to the state jurisdiction by Part 36, display of the costs and revenues so assigned will be misleading,[34] difficult to explain to state regulatory bodies,[35] and meaningless.[36]

3. Discussion

21. The Jurisdictional Separations Manual provides rules for the division of a carrier's costs and revenues into exactly two portions: (1) costs and revenues subject to the state regulatory jurisdiction and (2) costs and revenues subject to the interstate regulatory jurisdiction. The Separations Manual is part of this Commission's Rules and Regulations, and this Commission is responsible for its administration. Changes in the Separations Manual, however, are required by law to be referred to a Federal State Joint Board consisting of three members of this Commission and four state commissioners.[37]

22. Collection of the information requested in the "state" columns on the ARMIS reports is an important aspect of our role as administrator of the manual. It seems obvious that, if we are charged with assuring that the separations process is being conducted properly, we should at all times be aware of and be able to apprise the public of the results of that process. Knowledge of the costs and revenues which are allocated to the state jurisdiction by the separations process is also essential to the deliberations of the Joint Board. It would, for example, be difficult to determine whether an unexpected change in state regulated costs was caused by the Separations Manual, or by some unrelated process without knowing the amounts actually assigned by operation of the Separations Manual to the state.

23. We could, of course, derive the data in the "state" column by subtracting the amounts reported as assigned to the interstate jurisdiction from the amounts reported as being subject to separations.[38] However, the reports will be more legible and convenient to those who use them if each cost allocation process for which results are reported is displayed fully, than if users are required to calculate a column of data for themselves.

24. Furthermore, requiring carriers to report the results of each cost allocation process for each final cost objective imposes a necessary discipline on the companies in the preparation of their reports. In the case of jurisdictional separations, it assures that they will monitor their own processes and make certain that the amounts they report to this Commission as regulated costs and revenues and the amounts they report to the states do indeed add up to the total amounts which are subject to separation.

25. We find the arguments advanced by the LECs on this issue to be quite unpersuasive. Their position is, in essence, that they should not have to report the amounts assigned to the state jurisdiction because persons who look at the reports might not understand that those amounts are likely to differ from the amounts actually used in the development of rates for intrastate services. They fear they will have to explain themselves to state regulators and members of the public. This is simply not a good reason for us to remove from our reports information that we have found to be useful and necessary in the discharge of our regulatory responsibilities. Furthermore, we doubt that state regulators, who are well aware of the manner in which costs assigned to their jurisdiction are taken into account in their own ratemaking processes, will be confused by the data in our reports. Carriers who are truly concerned about confusion on the part of the general public are free to attach a suitable explanation to the paper copies of their reports.

D. Reporting of Data on Study Area Basis

1. Introduction

26. The Quarterly Report, the Joint Cost Report, and the Access Report all must be submitted by each company for each study area, as well as for the total company. A study area generally consists of a telephone company's service area within a given state, although there are instances in which a company has more than one study area in a particular state.[39]

2. Pleadings of the Parties

27. The LECs argue that revenue and rate of return data should be filed at the level of geographic aggregation at which the reporting company files its access tariffs, rather than by study area. They claim that aggregated access tariffs may produce a mismatch between revenues and costs at the study area level, thereby producing misleading information. They also argue that monitoring and rate of return enforcement is accomplished at the access tariff level, and therefore, no purpose will be served by the requirement to report at the study area level.

28. Western Union supports study area reporting, arguing that the *Cost Support Order* [40] adopting the 1988 TRP requires study area data as well as more aggregated data. Western Union notes that in our *1988 Filing Petitions Order* [41] this Commission denied petitions filed by Bell Atlantic and NYNEX seeking waiver of that requirement on the grounds that neither LEC had shown that the factors used to calculate cost and demand did not vary from state to state. Western Union alleges that, since none of the petitioning parties in the instant proceeding has made such a showing, their petitions should be denied.

29. In response to Western Union, UTS argues that Western Union's assertion that disaggregated cost and demand data are required is inapposite to UTS's request for reconsideration of the requirement that revenue and return data be reported by study area.[42]

3. Discussion

30. In the *ARMIS Order* we considered tariff level reporting but found that study area-level reporting was essential to the development of a continuous data series.[43] We found that, if we allowed LECs to combine or divide study areas, we would have to require them to file matching restatements of previous years' data each time they made such a combined or divided filing. We further found that such an alternative would be unnecessarily burdensome for our staff and for the carriers. The LECs have advanced no new arguments which would convince us that our need for a data base that is stable over time is outweighed by their concerns about possible misconstruction of study area data by users of the reports. We therefore decline to reconsider our requirements for reporting of data on a study area basis.

E. Confidential Treatment of Data

1. Introduction

31. The *ARMIS* reports will be routinely available to the public in both paper and machine readable form. The *ARMIS Order* states that companies that believe they will experience competitive harm through the release to the public of information contained in the reports should follow the procedures established by our Rules for requesting confidential treatment of such information.[44] The *Order* also clarifies that, in the case of automated filings, companies seeking confidential treatment of a portion of a report must provide two copies of both the paper and the computer media submissions. The first copy must contain all required information in both the paper and the computer media submissions, while the second copy may contain only the information for which the carrier is not requesting confidential treatment.[45]

2. Pleadings of the Parties

32. In its petition, BellSouth requests that this Commission automatically accord confidential treatment to forecast data. BellSouth argues that all of the criteria for such treatment are met in these data, because the data are sensitive and would not otherwise be available to the public. BellSouth notes that other firms in the competitive telecommunications market do not disclose such data. Bell South claims that it would be far more efficient to automatically treat these data as confidential than it would be to treat repeated requests for confidential treatment individually. Bell Atlantic, Contel, and USTA request that automatic proprietary treatment be given to all data that are not subject to tariff.

3. Discussion

33. This Commission has well-established rules and procedures which allow persons submitting information to request confidential treatment of that information at the time the information is submitted. Because we find those rules and procedures entirely adequate to protect the interests of the LECs, we decline to depart from those procedures in the manner requested by the LECs.

34. The LECs do not allege that they will suffer competitive harm if they are required to follow our usual procedures with respect to allegedly proprietary data contained in their *ARMIS* reports. Rather, they appear to believe that there is some way in which we can determine once for all time whether a particular line or column of data is entitled to confidential treatment. This belief reflects a mistaken interpretation of the Freedom of Information Act (FOIA) and of our Rules implementing the FOIA. We are required by law to consider every request for inspection of our records. Even if we have designated a record as one that is not routinely available for public inspection,[46] someone may still request to see that record. Our rules state that when such a request is made we "will weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection in the light of the facts of the particular case."[47] It is entirely possible that a record once withheld from public inspection may later be made available. This is particularly likely in the case of allegedly confidential commercial or financial information, which may be rendered non-confidential by the passage of time or by its availability elsewhere. Thus, there is no advantage in terms of administrative convenience to be gained by declaring any data to be "automatically" confidential.

F. Filing dates

1. Introduction

35. The *ARMIS Order* established filing dates for all the reports adopted by that *Order*. The Quarterly Report must be submitted every March 31, June 30, September 30, and December 31. The Joint Cost, USOA and Access Reports must be submitted every April 1.[48] These filing dates allow carriers three months after the close of the reporting period to prepare their reports. The text of the *ARMIS Order* adopted a filing date for the Joint Cost Forecast Report of September 1 of the year prior to that in which the forecasts are to be used. The text of the rules changes adopted by the *ARMIS Order*, however, adopted a filing date of December 1. That Order also established June 1, 1988 as the filing date for the initial Joint Cost Forecast Report.

2. Pleadings of the Parties

36. Seven parties request revision of the filing dates for one or more of the ARMIS reports. With respect to the Joint Cost forecast material the commenters note a conflict between the filing date specified in Appendix E of the *Order* and the date specified in the body of the *Order*. Bell Atlantic and BellSouth request that the Joint Cost Forecast Report be filed concurrently with the Tariff Review Plans. Moreover, two Petitioners request that the June 1 filing date for the 1988 forecast data be changed to allow filing of the initial forecast with the 1989 forecast data. With respect to the Access Report the parties argue that the current April 1 filing date provides the carriers with insufficient time to compile and edit the data for accuracy. Four commenters request the filing date for the Access Report be changed to June 30, one commenter suggests May 1, and one recommends July 1. Contel requests that all filing dates be left open pending publication of our report specifications, allowing time for comment on those specifications. Contel also requests that the Quarterly Report filing requirements be revised so that the filing is required only twice each year.

3. Discussion

37. We agree with the petitioning parties that clarification of the filing date for the Joint Cost Forecast Report is necessary. In its *Joint Cost Forecast Order* [49] the Bureau divided the Joint Cost Forecast Report into two reports: the Forecast Report and the Actual Usage Report. The Forecast Report requires the carrier to report the usage forecasts and to develop, based on the forecasts, the investment allocations to regulated and nonregulated that they must use to support their proposed access tariffs for the next year. The Actual Usage Report requires the carriers to report the actual levels of regulated and nonregulated usage for the previous year.The logical date for filing the Forecast Report is the date coinciding with the filing of the annual Tariff Review Plans. The logical date for the filing of the Actual Usage Report is the filing date of the USOA, Joint Cost, and Access Reports since all of these reports concern the results of the preceding calender year. Therefore, the filing dates are revised and clarified as follows: the Forecast Report will be filed with the Tariff Review Plans and the Actual Usage Report will be filed with the USOA, Joint Cost, and Access Reports. The rules changes required to implement these filing dates are set forth in the Attachment.

38. In its *Joint Cost Forecast Order* the Bureau postponed the filing of the 1988 forecasts from June 1 to June 30 to allow the carriers sufficent time to prepare their reports in accordance with the *Order*. We believe that any additional postponement of the filing date would unnecessarily delay our review of the forecasts. We attach some urgency to the receipt of this data because it has a direct bearing on our staff's current investigation of the allocations of cost to nonregulated activities that the carriers made in their 1988 access tariff cost support filings. We therefore deny the requests to further postpone the filing date for the 1988 Joint Cost Forecast Report.

39. We believe that the April 1 date for filing the Access Report is reasonable. That date requires only that annual data be completed and suitable for filing three months after the end of the annual filing period. Quarterly Reports are due on March 31, June 30, September 30, and December 31 of each year for the preceding quarter. We also believe that three months is sufficient to tabulate, organize and file the quarterly data submissions with the Commission.

40. We disagree with Contel's argument that submission of these data would be sufficient for the Commission's purposes if filed twice annually. In our *NPRM* in this proceeding, we proposed monthly filings of these data. However, in an effort to lessen the burden on the LECs we adopted a quarterly reporting requirement, with the stipulation that if quarterly reporting proves to be insufficient, we would consider monthly reporting. We found that we needed at least quarterly filing of these data in order to assess LEC requests for "mid-course corrections" of their access tariff rates. We continue to believe that timely information is essential to our understanding of industry trends and to proper evaluation of proposed rate

changes. We are not convinced the biannual filings would meet our needs; we therefore retain the current filing schedule for the quarterly report.

G. Elimination of Redundant Forms

41. The LECs suggest elimination of our current reporting forms in an expeditious manner. Some even suggest that we publish dates by which individual forms will be eliminated. Specifically, petitioners request abandonment of FCC Forms M, 901, and 492, claiming that these forms are now largely redundant. To the extent that Form 492 requires information not on the Quarterly Report, they suggest adding such information to the Quarterly Report.

42. On December 2, 1987, this Commission released a *Notice of Proposed Rule Making* in which we propose to eliminate FCC Form 901.[50] In that proceeding we stated that "By replacing the monthly reporting requirement with the newly established quarterly reporting requirement,[51] we will avoid a redundant filing requirement." Comments were filed on January 15, 1988, and Reply Comments were filed on February 9, 1988. We expect to act on this matter in the near future, and our decision therein will resolve the issue raised in this proceeding.

43. Part of Form M has already been replaced by the ARMIS USOA Report. This Commission's staff is now reviewing FCC Form M to determine whether some revision is required. Until that effort is completed, we will not disturb the current requirement for filing that form.

44. The purpose of FCC Form 492 is to monitor rate of return and refunds. The rules for restating results for a rate of return enforcement period are, without modification, incompatible with the rules that apply to our Quarterly Report. Thus, we do not believe that there would be any benefit to carriers or to the public by simply adding the Form 492 requirements to the *ARMIS Order* reporting requirements. We will, therefore, retain Form 492.

H. Reporting Joint Cost Allocations by Allocation Method

1. Introduction

45. The Joint Cost Report contains the following column headings: solely assigned to regulated, solely assigned to nonregulated, allocated to regulated, allocated to nonregulated, total nonregulated.

2. Pleadings of the parties

46. The LECs draw our attention to the fact that the column headings in the Joint Cost Report do not conform to the language used in the *Joint Cost Order*. The *Joint Cost Order* established a hierarchy of allocation methods for dividing costs between regulated and nonregulated operations. Direct assignment was the most preferred method, followed by direct attribution, indirect attribution, and finally, allocation using a general allocator.[52] The LECs propose that the column headings for "solely assigned" be renamed "assigned and attributed," and defined to include costs that were directly assigned, directly attributed, and indirectly attributed.[53] The column headed "allocated" would be redefined to include all generally allocated costs under this proposal.

3. Discussion

47. We agree with the parties that the choice of column headings in the Joint Cost Report should be amended. Our column headings obscured important information by lumping together cost allocations based on cost causation with those based on a general allocator. However, the LECs' proposed headings also would blur a significant distinction between cost allocation methodologies that is made in Section 64.901 of our Rules by combining direct assignment, direct attribution and indirect attribution. Directly assigned costs, which are the basis of the allocation of other costs, will certainly be subject to separate scrutiny when the carrier's cost allocations are reviewed. As the LECs have noted, levels of generally allocated costs are also of particular interest in monitoring compliance with the *Joint Cost Order*. We believe that, at least at this time, directly and indirectly attributed costs can be reported together without impairing our ability to review the carriers' cost allocations.

48. Accordingly, we are amending our Joint Cost Report so that the column headings will read: directly assigned to regulated, directly assigned to nonregulated, attributed to regulated, attributed to nonregulated, generally allocated to regulated, generally allocated to nonregulated, total regulated, total nonregulated, adjustments, and subject to separation.

IV. THE WESTERN UNION PETITION

A. Introduction

49. The Quarterly Report contains, in addition to cost, revenue, and return data, a Demand Analysis Table on which LECs are to report certain operating statistics used in monitoring access charges.[54] The Access Report requires annual reporting of the following separations factors: directory assistance weighted standard work seconds, calls received over toll directory assistance trunks, and directory assistance calls.

B. Pleadings of the parties

1. The Western Union petition

50. Western Union contends that the Demand Analysis Table does not contain sufficient information to permit users and this Commission to adequately review cost separations and allocations. Western Union urges us to include channel terminations,[55] circuits and interoffice airline miles for all interoffice mileage bands on the Quarterly Report.[56] The petition also asks that we amend the Access Report to include the following factors: working loops employed to allocate exchange line cable and wire facilities, information origination/termination equipment, and exchange-line circuit equipment; interexchange circuit miles employed to allocate interexchange cable and wire facilities; and circuit terminations used to allocate interexchange circuit equipment.[57]

51. In support of its petition, Western Union states that this Commission has often expressed concern about whether the data used to allocate costs between the regulatory jurisdictions and among services are consistent with actual and forecast demand quantities. Western Union argues that basic facilities counts and demand quantities must be reported if this Commission is to be able to test

for inconsistencies between cost and revenue data. Western Union contends that the burden of reporting the information it proposes will be slight.

2. Oppositions

52. USTA, Pacific, NYNEX, and Bell Atlantic oppose the Western Union petition. USTA argues that Western Union is asking for the reporting of data that is burdensome, unnecessarily detailed for a quarterly submission, and duplicative of other Commission activity. USTA notes that Western Union has raised its concerns, which focus on private line reporting, on a number of previous occasions, and that those concerns have been or are being addressed in other proceedings before this Commission. Pacific states that this Commission has recently rejected, on the grounds that the data would serve no useful purpose, a similar petition by Western Union for inclusion of additional data in the cost support material to be filed with the LECs' annual access tariffs[58]. Pacific contends that data which are not useful in reviewing access tariffs are beyond the purposes of the automated reporting system.

53. Bell Atlantic notes that this Commission is addressing production of data similar to that sought by Western Union in another proceeding.[59] Bell Atlantic states that we have asked certain LECs to provide, through sampling, a special study of the numbers of circuits and terminations used for various types of special access services, and that the purpose of this request was to determine whether the demand quantities used by the carriers to develop special access revenue requirements are consistent with the demand quantities used to develop special access rates. Bell Atlantic argues that this Commission should not require inclusion in the ARMIS reports of the data requested by Western Union until it has completed this study.

54. Bell Atlantic also challenges Western Union's position that the burden of supplying the data at issue would be slight. Bell Atlantic notes that the data request in the Special Access investigation was originally disapproved[60] by the Office of Management and Budget(OMB) under provisions of the Paperwork Reduction Act, and that this Commission, after overriding the OMB disapproval, met with the affected carriers and modified its information request.[61] Bell Atlantic states that the current study is taking more than one year, and that preparation and submission of the data requested by Western Union would require 240 person hours and 120 hours of computer time each quarter.

3. Reply

55. In its reply, Western Union argues that this Commission has never ruled that the data requested by Western Union should not be collected. Western Union notes that the order cited by the LECs as denying Western Union's petition to have this data included in the Tariff Review Plan was issued by the Chief, Common Carrier Bureau, and not by this Commission.[62] Moreover, states Western Union, when it petitioned for inclusion of similar data in the reports used to monitor rate of return, this Commission denied its request on the grounds that Western Union should have been seeking its desired relief in the ARMIS proceeding.

56. Western Union also argues that the ongoing Special Access study will not provide enough information to permit a determination of whether costs have been properly allocated. Western Union notes that it has detailed the alleged deficiences of that study in its pending Application for Review of the Bureau's 1987 access tariff order.

57. Western Union contends that the data it requests is well within the stated purposes of the instant proceeding. It states that one of those purposes was to collect data needed to evaluate the result of jurisdictional separations, that the report forms as adopted require such data only for switched access, and that it is hardly beyond the scope of the proceeding to collect similar data for special access.

58. In response to Bell Atlantic's contention that the submission of the requested data would be extremely burdensome, Western Union asserts that these data are used by the LECs to update their separations allocations, which in turn must be done in order to comply with this Commission's rate of return reporting requirements. Western Union claims that, if an LEC is not generating these data now, at least for internal purposes, it must not be following the proper separation rules in developing its reports.

C. Discussion

59. We agree with Western Union that the types of data it believes should be incorporated into the Quarterly Report and the Access Report are not beyond the intended scope of our automated reporting system. However, we believe that it would be premature, before completion of the Bureau's Special Access Study, to attempt to determine precisely what data should be included in our automated reports. We therefore deny Western Union's petition without prejudice. Western Union may, if it wishes, renew its petition upon completion of that study.

V. OTHER ISSUES

1. Introduction

60. The petitioning parties have made numerous recommendations regarding specific changes to each of the ARMIS Reports. A large number of the recommendations are of a technical or editorial nature.

2. Pleadings of the Parties

61. BellSouth states that the Commission is currently revising the rate base and net income determination principles that apply to dominant carriers and argues that the inclusion of items such as "cash working capital" and "deferred charges" in rate of return calculations be deferred until an order has been released in CC Docket No. 86-497.[63]

62. Bell Atlantic states that the Access Report is inconsistent with the manner in which Bell Atlantic currently accounts for and reports its separations data.[64] It notes that it is working with other carriers under the auspices of USTA to revise the Access Report to be acceptable to all carriers and to meet the Commission's needs.[65] BellSouth, GTE, USTA and UTS request that we clarify whether booked or adjusted data are required in the ARMIS Reports. The parties contend that the *ARMIS Order* and its appendices are unclear as to whether we contemplate inclusion of booked figures, based on unadjusted accounting entries; or adjusted figures, based on entries determined after separations adjustments. They are of the opinion that a combination of both booked and adjusted entries would give the best results for analysis.

63. GTE states that there is an apparent inconsistency between the Quarterly Report and the Access Report and the 1988 Tariff Review Plan in the treatment of deregulated customer premises equipment (CPE) under Part 36.[66] The inconsistency, according to GTE, arises from the Quarterly and Access Reports following the Part 36, Section 36.142(b) assignment of detariffed CPE to the state jurisdiction during the separations process, while the TRP removes detariffed CPE before separations. [67] GTE proposes that the TRP be modified to conform to the Quarterly and Access Report.

64. Pacific Bell states that selected data items proposed in the ARMIS Reports do not apply to all the columns. For example, it argues that since certain lines on the Quarterly Report only apply to the interstate jurisdiction, only these data should be reported from column g (Interstate) through column n (Non-Access).[68] Pacific Bell also argues that the line "Allowance for Funds Used During Construction" (AFUDC) should not be required for carriers for whom AFUDC is not recognized as revenue for ratemaking purposes.[69] It makes similar arguments for changes in the Joint and Access Reports.[70]

65. Pacific Bell also requests a number of clarifications and adjustments to the demand data required on the Quarterly Report.[71] It asks that provision be made to adjust the demand data to reflect subsequent prior period adjustments. It also suggests that we revise the format to reflect the 24 month prior period in a manner consistent with Form EC1051, revise the instructions for line 3, 4, and 6, eliminate lines 7 and 8 as redundant, and clarify lines 9 through 15.

66. Southwestern Bell notes some lines and columns of the Joint Cost Report which it believes contain technical inaccuracies.[72] It gives as an example the description of column j, calling for "that portion of each account which must be allocated between state and interstate jurisdictions." According to Southwestern Bell, this description does not exactly fit the separations treatment of accounts 2211, 2212, and 2215, since they are aggregated in account 2210 before being separated. Southwestern Bell also states that a line for account 7991 "Other Nonregulated Revenues" should be added under the revenue category "Miscellaneous Revenues."

67. USTA raises many of the same issues identified above.[73] In addition it states that the demand data in the Quarterly Report must be modified because it relies upon an entry for the line termination rate and the rate has been eliminated as access tariff rate element in 1988.[74] It recommends that this Commission work with the industry to develop a revised demand data table. USTA states that the Access Report should be modified because the lines do not take into account the fact that Parts 36 and 69 are not defined at the same level of detail. It suggests that the columns "unseparated" and "interstate" use level of detail required by Part 36, and that the columns "interstate access" and "nonaccess" use the level of detail required by Part 69.[75] The USTA Petition also includes a list of minor technical issues that it states should be addressed.[76] These issues includes, for example the misclassification of account 7370 (special charges) as an extraordinary item in the Quarterly and Joint Cost Reports, the substitution of account 6230 for 6223 in the USOA Report, and the addressing of certain stock ownership of carriers which relates to the Rural Telephone Bank. Finally, USTA summarized all its suggested changes in the ARMIS Reports in an attachment to it Reply.[77]

68. UTS also raises many of the issues identified above. It argues that the Quarterly Report should be modified to require that traffic sensitive demand be based on a billing analysis.[78] UTS also argues that the Access Report requires excessive amounts of detail. It suggests that, for example, lines 94-96, which show central office expenses, be combined into one line because all central office expense is allocated on the basis of total central office equipment investment. It recommends that we work with the industry to reduce the amount of detail required in the Access Report.[79]

69. Several LECs also call our attention to problems concerning the manner in which the reporting forms ask companies to calculate net investment. Bell Atlantic notes that the source data specified for the figures to be reported on the "beginning net investment " and "ending net investment" lines are not, in fact, beginning and ending of period data, but average data. Bell Atlantic suggests that we delete these lines from the forms because they will provide the Commission with no useful data.[80] Southwestern Bell and Bell Atlantic also observe that "average net investment" is calculated differently on the ARMIS forms than it is on FCC Form 492, the quarterly Rate of Return Report.[81] They urge that we resolve this conflict by using the Form 492 method on the ARMIS reports.

70. Western Union objects to the UTS suggestion that central office expenses be aggregated, arguing that it has submitted a petition for reconsideration[82] of the specific amendment to Part 69 that allocates central office expense on the basis of total central office equipment investment.[83]

3. Discussion

71. Since the release of the *ARMIS Order* we have discovered a number of problems with the integration of Parts 32, 36, 64, and 69 in the ARMIS Reports. The petitions of the parties to this proceeding have added substantially to the number of areas that must be investigated and, if necessary, revised. We believe that these problems can be most effectively addressed in consultation with filing companies, users, and interested parties, on a report by report basis. Accordingly, we direct the Common Carrier Bureau to review each report and to issue a revised version of each report by Public Notice on or before the following dates: (1) Quarterly Report - October 31, 1988; (2) USOA Report - November 15, 1988; (3) Joint Cost Report - December 30, 1988; and (4) Access Report - January 15, 1989.[84]

72. Carriers required to file a Quarterly Report on June 30, 1988 will use the form issued in the *ARMIS Order*, Appendix A, as modified by this *Order*. Where a technical problem precludes the entry of a complete and accurate answer, a footnote should be entered indicating the exact nature of the problem. Where no entry is possible, a zero and an explanatory footnote should be entered. For example, the lines on the Quarterly Report's Demand Analysis Table call for terminating minutes of use to be calculated as terminating revenue divided by the terminating line rate. Since the 1988 access tariff structure no longer includes a terminating rate element, no entry for terminating minutes of use is possible until the Quarterly Report is revised.

VI. PAPERWORK REDUCTION ACT

73. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

VII. ORDERING CLAUSES

74. IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, 219, 220 and 405 of the Communications Act of 1934, 47 U.S.C. 154(i), 154(j), 201-205, 219, 220 and 405, that the Petitions for Reconsideration filed in this proceeding ARE GRANTED IN PART and DENIED IN PART as provided herein.

75. IT IS FURTHER ORDERED, That Part 43 of the Commission's Rules, 47 C.F.R. Part 43, IS AMENDED, as set forth in the Appendix hereto, effective 30 days from publication of the text thereof in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 43, Reports of Communications Common Carriers and Certain Affiliates is amended as follows:

43.21 Annual Reports of Carriers and Affiliates

* * * *

(e) Each communications common carrier required by order to file a manual allocating its costs between regulated and nonregulated operations shall file, coincident with its Annual Access Tariff Review Plan, a forecast of regulated and nonregulated use of network plant for the following calendar year; and, a report of the actual use of network plant investment for the same reporting period on or before April 1 of the following year.

* * * *

FOOTNOTES

[1] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), 2 FCC Rcd 6283 (1987) (*ARMIS Order*).

[2] Petitions for Reconsideration were due October 26, 1987. Oppositions were due November 20, and Replies were due December 3. Petitions were filed by the Bell Atlantic Telephone Companies (Bell Atlantic); South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, and BellSouth Corporation (BellSouth); Contel Corporation (Contel); GTE Service Corporation (GTE); The Pacific Companies (Pacific Bell); Southwestern Bell Telephone Company (Southwestern Bell); The United States Telephone Association (USTA); United Telecommunications, Inc. (UTS); and Western Union. Oppositions were filed by Bell Atlantic, The New England Telephone and Telegraph Company and The New York Telephone Company (NYNEX), Pacific Bell and Western Union. Replies were filed by Bell Atlantic, BellSouth, USTA, UTS and Western Union.

[3] 47 C.F.R. §§32.1 *et seq.*

[4] 47 C.F.R. §64.901.

[5] *See* Separation of costs of regulated telephone service from costs of nonregulated activities, 2 FCC Rcd 1298, (*Joint Cost Order*) *modified on recon.* 2 FCC Rcd 6283 (1987), *Appeal docketed sub nom.* Southwestern Bell Corp. v. FCC, No. 87-1764 (D. C. Cir. December 14, 1987) and National Telephone Cooperative Ass'n v. FCC, No. 87-1771 (D. C. Cir. December 15, 1987), *petitions for further recon. pending.*

[6] 47 C.F.R. §§36.1 *et seq.*

[7] 47 C.F.R. §§69.1-.612.

[8] *ARMIS Order*, 2 FCC Rcd at 5770.

[9] The Tariff Review Plan (TRP), which is developed each year by the Common Carrier Bureau for use by the LECs in filing their annual access tariffs, is also part of the automated reporting system.

[10] On May 31, 1988, the Common Carrier Bureau released its Order, Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules) CC Docket 86-182, DA 88-809, which resolved the issues surrounding our requirement that carriers report forecasted and actual investment usage.

[11] The Joint Cost Report contains the following columns: solely assigned to regulated, solely assigned to nonregulated, allocated to regulated, allocated to nonregulated, total regulated, total nonregulated, adjustments, and total regulated subject to separations.

[12] The columns on the Access Report are as follows: total unseparated, state, interstate, common line, switching, local transport, information, special access, total access, and nonaccess.

[13] The Quarterly Report contains the following columns: total company, nonregulated, other adjustments, subject to separations, state, interstate, common line, switch, transport, information, special access, total access, and nonaccess.

[14] Bell Atlantic Petition at 2. We summarize Bell Atlantic's arguments here because Bell Atlantic addresses this issue more fully than any other petitioner. USTA and several carriers make similar arguments in their petitions.

[15] *Id.* n.7.

[16] *Id.* at 2, n.8, *citing* Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements, 1 FCC Rcd 952, 954 (1986) (*Monitoring Order*).

[17] *Id.* at 2, n.9, *citing* Commission Requirements for Cost Support Material to be Filed with 1988 Annual Access Tariffs, Mimeo No. 4219, released July 30, 1987.

[18] For this proposition Bell Atlantic cites 5 USC §553(c).

[19] Bell Atlantic Petition at 3, *quoting Joint Cost Order* 2 FCC Rcd at 1304 (elipsis by Bell Atlantic).

[20] *Id.* at 3.

[21] Such a position would be difficult to maintain in light of §219(a) of the Communications Act, which specifically authorizes the collection of revenue data:

> The Commission is authorized to require annual reports from all carriers subject to this Act, and from persons directly or indirectly controlling or controlled by, or under

> direct or indirect common control with, any such carrier, to prescribe the manner in which such reports shall be made, and to require from such persons specific answers to all questions upon which the Commission may need information. Except as otherwise required by the Commission, such annual reports *shall show in detail. ... the earnings and receipts from each branch of business and from all sources.* ... (emphasis added).

[22] Indeed, several LECs note our inadvertent omission of Account 7991, other nonregulated revenues, from that form, and suggest that it should be included.

[23] We discuss the LECs' contention that this Commission should not collect state revenue data in our discussion of the requirement that they file generally state data. *See* ¶¶ 22-26, below.

[24] For example, companies generally allocate uncollectibles based on the ratio of nonregulated revenues to total revenues. *See, e. g.*, Ameritech Operating Companies Permanent Cost Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 433, ¶¶ 67-68 (1988). Several companies have also proposed to allocate certain costs based on revenues. *See, e.g.*, Bell Atlantic Telephone Companies' CC Docket 86-111 Cost Allocation Manual, page 7.6-29 (revised March 14, 1988).

[25] 5 USC §552(b)(4).

[26] 47 C.F.R. §0.461.

[27] For a listing of the columns on these forms, see § II, above.

[28] BellSouth Petition at 7.

[29] Contel Petition at 5.

[30] GTE Petition at 4, n*.

[31] Bell Atlantic Petition at 5.

[32] Accordingly, the following lines and columns of the Quarterly Report will be entered as "N/A": lines 52, 53, 54, 55, 56; columns b, c, d, e, and f. Lines 88-92 of the Joint Cost Report are deleted for all columns.

[33] Bell Atlantic Petition at 6; BellSouth Petition at 7; Pacific Bell Petition at 21; and, USTA Reply at 3.

[34] Bell Atlantic Petition at 6.

[35] BellSouth Petition at 7.

[36] Pacific Bell Petition at 21.

[37] 47 USC §410(c).

[38] No party objects to the reporting of total amounts subject to separations or to the reporting of amounts assigned to the interstate jurisdiction.

[39] Study area boundaries were frozen by the Commission as they existed on November 15, 1984. 47 C.F.R. Part 67, Subpart G (Glossary) and 47 C.F.R. Part 36, Subpart H (Glossary).

[40] Commission Requirements for Cost Support Material to be Filed With 1988 Annual Access Tariffs, Mimeo No. 4219, released July 30, 1987 (*1988 Cost Support Order*).

[41] Annual 1988 Access Tariff Filing Petitions for Waiver, *MO & O*, released September 3, 1987 (*1988 Filing Petitions Order*).

[42] UTS Reply at 2. *See also* Bell Atlantic Reply at 2 (agreeing to report cost and revenue data by study area, but arguing against reporting rate of return on that basis.)

[43] *ARMIS Order*, ¶¶ 26-27, 2 FCC Rcd at 5770.

[44] *See* 47 C.F.R. §§0.459 *et seq*.

[45] *ARMIS Order*, ¶¶ 47-50, 2 FCC Rcd at 5770.

[46] *See* 47 C.F.R. § 0.457.

[47] *Id.*

[48] *ARMIS Order*, ¶ 54, 2 FCC Rcd at 5770.

[49] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Part 31, 43, 67, and 69 of the FCC's Rules, DA 88-808 (released May 31, 1988) (*Joint Cost Forecast Order*).

[50] Elimination of FCC Form 901, Monthly Form Required from Telephone Companies, CC Docket No. 87-503, FCC 87-349.

[51] This refers to the quarterly reporting requirement in ARMIS.

[52] *See* CFR 47 §64.901.

[53] *See* USTA Petition at 10.

[54] The form calls for the following data to be submitted quarterly, with monthly detail: Common Line demand- minutes of use (premium originating, premium terminating, nonpremium originating, nonpremium terminating) and Switched Traffic Sensitive Demand- minutes of use (premium, nonpremium.) The following data are to be submitted quarterly: carrier common line originating minutes of use, carrier common line terminating minutes of use, single-line business customer premises terminations (CPTs), residence CPT lifeline, residence CPT non-lifeline, multiline business CPTs, centrex-CO and similar lines, special access lines subject to surcharge, and total access lines.

[55] According to Western Union, channel terminations should be segregated between collocated and non-collocated, because working loops used for cost allocation purposes are required only where the termination does not involve a connection between LEC and an interexchange carrier or customer on the same premises. Western Union Petition at 3, n.1.

[56] Western Union states that these data should be shown for metallic, 2- wire and 4- wire telegraph and voice grade, WATS, audio part time, audio program, video part time, video, high capacity, DDS and wideband services.

[57] Western Union notes that these factors should be the actual quantities for the reporting period, so that they can be compared to the actual demand quantities for the same period.

[58] Pacific cites Commission Requirements for Cost Support Material To Be Filed With 1988 Annual Access Tariffs, 2 FCC Rcd 5178 (1987).

[59] Bell Atlantic cites Request for Information Concerning Local Exchange Carrier Special Access Demand Quantities, 2 FCC Rcd 3236 (1987).

[60] *Id.* at 3240, n. 22.

[61] *Id.* at 3238.

[62] Western Union also states, in this regard, that its Application for Review of the Bureau's December 31, 1986 decision not to investigate the 1987 access tariff filings has yet to be acted on by this Commission.

[63] BellSouth Petition, p.7. The Commission released an order in CC Docket No. 86-497 on December 24, 1987.

[64] Bell Atlantic Petition at 8.

[65] *Id.*

[66] Commission Requirements for Cost Support Material to be filed with 1988 Annual Access Tariffs, released Junly 30, 1987.

[67] *Id.*

[68] Pacific Bell Petition at 5-9.

[69] *Id.* at 10.

[70] *Id.* at 15-21.

[71] *Id.* at 12-14.

[72] Southwestern Bell Petition at 6-8.

[73] USTA Petition at 2-16.

[74] *Id.* at 10.

[75] *Id.* at 12.

[76] *Id.* Attachment.

[77] USTA Reply, Attachment R1.

[78] UTS Petition at 5.

[79] *Id.* at 6.

[80] Bell Atlantic Petition at 5, n.16.

[81] *See* 47 C.F.R. §65.600. For discussion of the relationship between Form 492 and the ARMIS reports, see ¶ 45, above.

[82] Western Union Petition for Reconsideration and Request for Expedited Treatment, CC Docket No. 87-113, filed September 2[illegible] 1987.

[83] Western Union Opposition at 3.

[84] The *ARMIS Order* directed the staff to issue by, July 1, 1988, the complete details of the USOA, Joint Cost and Access Reports. The schedule we are adopting herein supersedes the July 1, 1988 date.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

JOANNE BREHM File No. A .N-850709MV

For a Construction Permit for a
New FM Station on Channel 265A
Apalachicola, Florida

MEMORANDUM OPINION AND ORDER

Adopted: October 12, 1988; Released: November 1, 1988

By the Commission:

1. The Commission has under consideration a Petition for Reconsideration filed on November 21, 1986, by Joanne Brehm (Brehm) of an action by the Commission denying Brehm's Application for Review of the Mass Media Bureau's denial of Brehm's Petition for Reconsideration of the return of the above-captioned application.

2. Brehm submitted her application on July 9, 1985. The application was returned by the Chief, FM Branch, Audio Services Division, Mass Media Bureau, on August 20, 1985 as not sufficient for tender because the radiation center height listed in Section V-B, Item 6 of FCC Form 301 conflicted with data on the antenna sketch submitted as an exhibit required by Section V-G, Item 6.[1] The Brehm application was also deemed not sufficient for tender because the transmitter site map submitted with the application failed to comply with the requirements established for such maps in the *Public Notice*, Mimeo 3693, released April 5, 1985, and called for by FCC Form 301, Section V-B, Item 13.[2]

3. Brehm petitioned for reconsideration on September 19, 1985, stating that: (1) the application complied with all requirements of the Commission's Rules and applicable forms; (2) the action by the Commission was arbitrary and capricious as all the questions in the application form were fully answered and Brehm saw no discrepancies between Item 6, Section V-B and Item 6, Section V-G; and (3) even if there were a discrepancy, the Commission, under *James River Broadcasting Co. v. FCC*, 399 F.2d 581 (D.C. Cir. 1968) (*James River*), is required to accept amendments where there is some "minor inconsistency" between the application and Commission requirements. Brehm's Petition for Reconsideration was subsequently denied by the Chief, Audio Services Division, Mass Media Bureau, on November 14, 1985, on the grounds that: (1) applicants were given ample notice in the *Report and Order* that such omissions or unresolvable inconsistencies would be dealt with by dismissal of the subject applications; (2) the *Report and Order*, which specified the tenderability requirements regarding the consistency and accuracy of such data was adopted after a notice and comment period; and (3) *James River* does not apply because the processing rules which were the basis for the *James River* holding have been drastically changed.

4. On December 9, 1985, Brehm filed an Application for Review of the denial of her September 19, 1985 Petition for Reconsideration. In her Application for Review, Brehm reiterated the arguments advanced in her petition for reconsideration, claiming that she was still unable to discover any discrepancy between Item 6, Section V-B and Item 6 Section V-G. Brehm's Application for Review was subsequently denied by the Commission in a *Memorandum Opinion and Order*, 1 FCC Rcd 403 (1986). The Commission found that, despite Brehm's professed inability to discover the inconsistency in her antenna sketch, the discrepancy was obvious.[3] The Commission then pointed out one of a number of inconsistencies associated with Brehm's antenna sketch. The Commission stated that the sketch:

> shows the overall structure height as 341 feet above mean sea level. The tower sketch also indicates that the radiation center is 13 feet below the overall height of the tower structure. This would result in an antenna radiation center height above mean sea level of 328 feet. . . . However, the same tower sketch specifies the radiation center as 331 feet above mean sea level.

Memorandum Opinion and Order, 1 FCC Rcd at 403.

The Commission also affirmed the staff's holding that Brehm's reliance on *James River* was misplaced since the processing rules in effect at the time *James River* was decided have been changed dramatically. Finally, the Commission emphasized the need for streamlining the application process and preventing "carelessly prepared, unprocessable applications from burdening the processing system." *Memorandum Opinion and Order*, 1 FCC Rcd at 404. "Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service." *Chudy Broadcasting Corporation*, 58 RR 2d 133, 134, n. 7 (1985).

5. In the instant Petition for Reconsideration, Brehm concedes that there is an inconsistency in her antenna sketch, but argues that pursuant to the *Report and Order* in Docket 84-750, the Commission can "confidently and reliably" derive the correct information drawing on the application as a whole. Brehm also once again advances the argument that she should be allowed to file a corrective amendment, citing *James River* as authority.

6. In establishing the requirements for an application to be deemed substantially complete and, thus, sufficient for tender, the Commission stated, *inter alia*, that

> If any of the above information is missing, the application will be returned as not sufficient for tender. If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, *confidently and reliably*, drawing on the application as a whole, such defect will not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and *with a high degree of confidence*, the presence of the

> clearly void data will be treated as functionally equivalent to the absence of such data. In such instances, the defective application will be deemed not sufficient for tender.

Report and Order in MM Docket 84-750, 50 Fed. Reg. 19936, 19946 (Appendix D) (1985) (emphasis added).

Brehm asserts that given the unique nature of her transmitter site (an island situated in Apalachicola Bay), the staff could have confidently and reliably resolved the defect in her tower sketch. Specifically, Brehm argues that Figure 6, Section V-G of her FCC Form 301 indicates that the average elevation of the terrain surrounding the transmitter site is sea level and therefore, that the height of the radiation center above average terrain would also be the height of the radiation center above mean sea level. Since Brehm's tower sketch indicates that the height of the radiation center above ground is 325 feet and the ground level at the tower site is 3 feet above sea level, Brehm argues that the staff could confidently and reliably conclude that the height of the radiation center above mean sea level was the sum of these two figures *i.e.*, 328 feet, not 331 feet as depicted on the tower sketch and specified in Section V-B, Item 6 of Brehm's Form 301.

7. Although at first glance appealing, Brehm's argument presents only one of several plausible solutions to resolving the inconsistency in her tower sketch. The fatal flaw in Brehm's argument is that it relies on certain assumptions that we simply can not make with a high degree of confidence. Namely, Brehm's argument requires that we assume that the tower sketch correctly specified the height of the radiation center above ground as 325 feet and the ground level as 3 feet. However, given the internal inconsistencies in the values specified in Brehm's tower sketch and reiterated in Section V-B, Item 6 of her Form 301, these assumptions cannot be made. For example, the ground level of Brehm's transmitter site can be calculated by subtracting the overall structure height (*i.e.*, 338 feet) from the overall height above mean sea level (*i.e.*, 341 feet) or by subtracting the antenna radiation center height above ground level (*i.e.*, 325 feet) from the radiation center height above mean sea level (*i.e.*, 331 feet). If all the values specified in Brehm's application were accurate, the ground level or site elevation would be the same using both methods set forth above. However, using these two methods we come up with two different values for the ground level (*i.e.*, 3 feet or 6 feet). Even taking the "highly unusual" location of the tower into account as Brehm requests, the Commission finds neither the 3 foot nor 6 foot figure unreasonable for elevation for an island site off the coast of Florida. Ground level may also be determined by using the topographical map. However, that portion of the topographical map which would allow us to determine the site elevation was illegible and, therefore, could not be used to verify the ground height at the transmitter site.

8. Brehm's argument also requires that we assume that the tower sketch correctly specified the height of the radiation center above ground as 325 feet and, when added to the site elevation value specified (*i.e.*, 3 feet), confirms that the height of the antenna radiation center above mean sea level would be 328 feet. However, if the value of the site elevation (*i.e.*, 3 feet) specified in the tower sketch is subtracted from the value of the radiation center above mean sea level (*i.e.*, 331 feet) also specified in that sketch, the height of the antenna radiation center above ground would be 328 feet, not 325 feet as Brehm would have us assume. Clearly, the only assumption the staff could make with respect to Brehm's tower sketch is that *one* of the values specified in the tower sketch and Section V-B, Item 6 of her Form 301 is incorrect. However, a determination as to which one of these values is incorrect cannot be made with a high degree of confidence drawing on the application as a whole. Therefore, the dismissal of Brehm's application as not sufficient for tender was necessary and proper.

9. Brehm's final argument concerns a corrective amendment which she asserts is entitled to consideration pursuant to the doctrine of *James River*.[4] Both the Bureau and the Commission have previously explained to Brehm that *James River* is inapplicable here since the processing rules which were the basis of the Court's ruling in that case have been dramatically changed and the new processing rules do not allow for the submission of untimely amendments like the one Brehm proposes to file.[5] Section 1.106(b)(2) of the Commission's Rules provides that a Petition for Reconsideration of an Application for Review will be entertained only if it relies on facts which were either unknown or have occurred or circumstances which have changed since the last opportunity to present such matters. Having failed to present any new facts or changed circumstances for our review, Brehm's *James River* argument is procedurally defective and requires no further consideration. In any event, the Commission's decision on this point was clearly correct.

10. Accordingly, for the foregoing reasons, IT IS ORDERED, That the Petition for Reconsideration filed by Joanne Brehm IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] By means of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985) (*Report and Order*), the Commission established as a prerequisite of tenderability or substantial completeness that broadcast applicants include, as part of their applications, responses to Section V-B, Item 6 and Section V-G, Item 6, FCC Form 301. Paragraph 4(e) of Appendix D to the *Report and Order*, states:

> Also necessary are the antenna heights above average terrain, above ground level, and above mean sea level. These three are interrelated and must be specified consistently, as is the case with all other crucial engineering parameters. Antenna height is as elemental a facility parameter as is ERP. It is also subject to permissible-range values as a function of station class and, with ERP, determines the coverage area of a facility for a given signal strength. Antenna height is also limited in certain cases by international treaty or by allocation constraints. Antenna height and ERP are also used to determine adverse potential to radio quiet zones, adjacent and co-channel "grandfathered"

stations, and to FCC monitoring facilities. Antenna height above ground affects the environmental and aerial-navigation aspects of a facility proposal. Clearly, the various antenna heights are employed in a number of processing evaluations by the staff. Their absence, or the absence of any one of them, renders the application not substantially complete. 50 Fed. Reg. 19946.

[2] The decision to return Brehm's application for the noncomplying 7.5 minute topographical map was reversed upon Commission Review. On October 24, 1986, the same day Brehm's Application for Review was denied, the Commission adopted a *Memorandum Opinion and Order* which concluded that applicants for FM facilities had not been provided sufficient notice of the 7.5 minute map requirements set forth in the April 5, 1985 *Public Notice*. As such, all applicants who had preserved thier rights at the various levels of appeal were reinstated *nunc pro tunc* and given a chance to amend to correct the deficient map. *See FM Transmitter Site Map Submissions Required by FCC Forms 301 and 340*, 1 FCC Rcd 381 (1986). Accordingly, if Brehm's original application had been returned for this tenderability defect alone, her application would have been reinstated pursuant to the above Order. Brehm has not sought reconsideration of this aspect of the Commission's *Memorandum Opinion and* Order denying her Application for Review.

[3] The Bureau inadvertently mischaracterized the discrepancy in Brehm's application as being between Section V-B, Item 6 and the tower sketch. The inconsistent figures depicted in the tower sketch were reiterated in Item 6, Section V-B. Thus, there was no discrepancy between Item 6, Section V- B and the tower sketch submitted in response to Item 6, Section V-G, rather the discrepancy was within each item itself. The mischaracterization is of no decisional significance, however, since a fatal discrepancy exists and applicants are not permitted to amend their applications to cure tenderability defects.

[4] In *James River*, the United States Court of Appeals for the District of Columbia Circuit ruled that in accordance with the processing rules in effect at the time of their decision, applicants whose applications were substantially complete as of the cut off date could file minor curative amendments after that date provided such an amendment did not require assignment of a new file number to the underlying application. At the time, the Commission's rules explicitly provided that any application could be amended as a matter of right prior to the adoption date of an order designating that application for hearing.

[5] Contrary to Brehm's belief, the Commission has not abolished the doctrine of *James River*. However, to the extent that the doctrine is inconsistent with the "hard-look" processing rules validly promulgated in Docket 84-750, *James River* is not applicable to the processing of FM applications. *See generally Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 7, 1988

DEPRECIATION RATE PRESCRIPTIONS PROPOSED FOR AMERICAN TELEPHONE AND TELEGRAPH COMPANY'S TWENTY-TWO OPERATING COMPANIES PLEADING CYCLE ESTABLISHED

The Commission invites comments on proposed revised depreciation rates and amortizations for American Telephone and Telegraph Company's (AT&T's) twenty- two subsidiary operating companies. The Commission has evaluated depreciation rates for these companies in accordance with the triennial review schedule. The expenses and composite rates reflecting the proposed rates are listed in the Attachment. These expenses and composite rates include a four-year amortization of the January 1, 1988 depreciation reserve imbalance and special net book amortizations of Central Office Equipment (COE)-Crossbar investment in five jurisdictions and Analog Electronic investment in three jurisdictions to correct substantial reserve problems. The Attachment also lists the twenty-two companies by jurisdiction, the current expenses and composite rates (developed using the currently prescribed depreciation rates and amortizations) and the proposed change in expenses (proposed vs. current) for each jurisdiction.

On May 10, 1988, AT&T filed studies with this Commission in support of its proposed depreciation rates. The Common Carrier Bureau reviewed these studies and obtained additional information regarding the studies from AT&T before arriving at its preliminary recommendations. On September 2, 1988, the Bureau sent letters to the state public utility commissions describing the Bureau's preliminary recommendations and requesting their comments on the life, salvage and curve shape parameters to be used for the prescription of the operating companies' depreciation rates. In addition, the Bureau discussed AT&T's study as well as the Bureau's preliminary recommendations with representatives of several state commissions who replied to the September 2, 1988 letters. After considering all of this information, the Bureau is recommending the depreciation parameters which underlie the rates shown on the Attachment. AT&T requests a January 1, 1988 effective date for the rates and amortizations.

Copies of the operating companies' initial 1988 depreciation rate study filings, replies to the September 2, 1988 letters and other data supporting the proposed rates are available for public inspection in Suite 257, 2000 L Street N.W., Washington, DC. Copying facilities are available in Suite 812, 2000 L Street.

Parties wishing to file comments on the proposals as summarized herein may do so by **October 27, 1988.** Replies may be filed by **November 8, 1988.** A copy of the comments and replies should be provided to the Chief, Depreciation Rates Branch.

For additional information contact Ms. Fatina Franklin, Chief, Depreciation Rates Branch (202) 632-7500.

ATTACHMENT

SUMMARY OF PROPOSED CHANGES IN ANNUAL DEPRECIATION EXPENSE BY JURISDICTION

Company - Jurisdiction	Investment	Annual Depreciation Expense and Composite Rate					
		Current		Proposed		Proposed Change	
		Rate	Expense	Rate	Expense	Expense	Percent
	($)	(%)	($000)	(%)	($000)	($000)	(%)
AT&T of California	1359732367	8.0	109339	10.0	136347	27008	24.7
AT&T of Delaware	7770664	27.8	2164	3.6	276	-1888	-87.2
AT&T of Illinois	340191334	6.9	23539	7.6	25767	2228	9.5
AT&T of Indiana	159417729	9.0	14360	7.5	11960	-2400	-16.7
AT&T of Maryland	66653557	8.5	5670	9.4	6235	565	10.0
AT&T of Michigan	244900359	9.1	22184	10.4	25361	3177	14.3
AT&T of Nevada	70702115	6.4	4512	9.1	6413	1901	42.1
AT&T of New England							
Maine	31402408	11.0	3469	16.4	5148	1679	48.4
Massachusetts	158019042	10.2	16111	13.5	21293	5182	32.2
New Hampshire	35990948	7.5	2697	9.9	3581	884	32.8
Rhode Island	27495646	10.1	2767	12.7	3495	728	26.3
Vermont	17794861	12.1	2151	12.3	2185	34	1.6
AT&T of New Jersey	173187650	9.9	17134	10.7	18463	1329	7.8
AT&T of New York	978452957	7.5	73111	9.3	91401	18290	25.0
AT&T of Ohio	237991196	9.2	21974	11.0	26098	4124	18.8
AT&T of Pennsylvania	292828805	8.5	24987	11.8	34676	9689	38.8
AT&T of the Midwest							
Iowa	118375140	7.7	9121	11.0	12985	3864	42.4
Minnesota	124470660	9.2	11412	9.1	11271	-141	-1.2
Nebraska	53551755	7.1	3781	8.9	4791	1010	26.7
North Dakota	43100206	10.6	4577	11.0	4746	169	3.7
South Dakota	32927154	10.5	3471	14.0	4607	1136	32.7
AT&T of the Mountain States							
Arizona	76291488	9.4	7170	18.0	13702	6532	91.1
Colorado	184466371	6.9	12788	8.2	15132	2344	18.3
Idaho	14602174	6.7	982	11.8	1716	734	74.7
Montana	49963267	9.3	4624	13.2	6599	1975	42.7
New Mexico	46816893	7.3	3438	8.7	4080	642	18.7
Utah	49790128	8.8	4362	11.1	5540	1178	27.0
Wyoming	24788735	7.5	1851	10.5	2608	757	40.9
AT&T of the Pacific Northwest							
Oregon	149283334	10.6	15877	9.0	13407	-2470	-15.6
Washington	177091875	7.9	14076	9.9	17487	3411	24.2

Company - Jurisdiction	Investment	Annual Depreciation Expense and Composite Rate					
		Current		Proposed		Proposed Change	
		Rate	Expense	Rate	Expense	Expense	Percent
	($)	(%)	($000)	(%)	($000)	($000)	(%)
AT&T of the S. Central States							
Alabama	180558469	7.8	14033	9.6	17333	3300	23.5
Kentucky	86361194	6.9	5923	9.7	8376	2453	41.4
Louisiana	173272025	8.2	14211	10.0	17252	3041	21.4
Mississippi	69121492	10.0	6930	9.7	6717	-213	-3.1
Tennessee	126998173	7.0	8930	9.7	12322	3392	38.0
AT&T of the Southern States							
Florida	411597019	9.4	38662	11.2	46132	7470	19.3
Georgia	317054416	7.8	24775	9.2	29107	4332	17.5
North Carolina	208194037	8.1	16762	11.9	24755	7993	47.7
South Carolina	148155571	7.6	11305	10.5	15560	4255	37.6
AT&T of the Southwest							
Arkansas	63018699	9.5	6005	12.9	8155	2150	35.8
Kansas	57475084	12.0	6888	17.5	10050	3162	45.9
Missouri	216367339	8.1	17590	10.7	23136	5546	31.5
Oklahoma	104573372	8.9	9352	10.2	10640	1288	13.8
Texas	743738770	7.8	57695	10.7	79278	21583	37.4
AT&T of Virginia	192821188	8.0	15382	10.3	19815	4433	28.8
AT&T of Washington, D.C.	46104363	8.1	3722	10.7	4920	1198	32.2
AT&T of West Virginia	52069848	7.3	3820	9.2	4775	955	25.0
AT&T of Wisconsin	93628961	8.7	8162	11.0	10269	2107	25.8
COMPOSITE TOTAL	8639160838	8.3	713846	10.3	885962	172116	24.1

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of:

SCHOOL DISTRICT NO. 1 IN THE CITY AND COUNTY OF DENVER AND THE STATE OF COLORADO — File Nos. BPIF-840217DE, BPIF-840217DD

For Licenses in the Instructional Television Fixed Service on Channels D1-D4 and G1-G4, Denver, Colorado

BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO — File Nos. BPIF-831129DA, BPIF-831017DA

For Licenses in the Instructional Television Fixed Service on Channels A1-A4 and B2 and B4, Boulder, Colorado

HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC. — File No. BPIF-831219DC

For License in the Instructional Television Fixed Service on Channels D1-D4, Denver, Colorado

INSTRUCTIONAL TELECOMMUNICATIONS FOUNDATION, INC. — File No. BPIF-831220DA

For License in the Instructional Television Fixed Service on Channels D1-D4, Denver, Colorado

MEMORANDUM OPINION AND ORDER

Adopted: October 14, 1988; Released: November 1, 1988

By the Commission:

1. The Commission has before it for consideration: (a) a letter of November 10, 1986, by the Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, granting the above-captioned applications of the Board of Regents of the University of Colorado (University) and School District No. 1 in the City and County of Denver and the State of Colorado (School District), and dismissing the above-captioned applications of Hispanic Information and Telecommunications Network, Inc. (HITN) and Instructional Telecommunications Foundation, Inc. (ITF);[1] (b) a letter of October 5, 1987, by the Chief, Video Services Division, Mass Media Bureau, denying petitions for reconsideration by HITN and ITF of the dismissal of their applications; (c) applications for review filed by ITF and HITN on November 4, 1987, and November 23, 1987, respectively; and (d) related pleadings.[2]

2. In brief, the application for review filed by HITN contends that (1) its application is entitled to comparative consideration with local applicants even though it is not a local applicant in Denver; and (2) the grants of waivers of the four-channel limitation rule for both University and School District were improper and their waiver requests should be denied. The application for review filed by ITF contends that (1) the staff erred in concluding that ITF was not a local applicant in Denver for the purpose of comparative consideration with School District; (2) there is a substantial question as to whether School District is financially qualified; and (3) School District violated Section 1.65 of the Commission's Rules by failing to report substantial and material changes in its application.[3]

3. The staff actions have been reviewed and we conclude that the matters involved were properly decided in accordance with the Rules and applicable precedent. Nonetheless, further discussion of certain of these matters is warranted to respond comprehensively to the matters raised in the applications for review.

HITN

4. HITN, a nonprofit organization headquartered in New York City, maintains that the staff erred in failing to afford it comparative consideration with local applicants in Denver. Pointing to various statements throughout our *Second Report and Order in MM Docket No. 83 - 523 (Order)*, 101 FCC2d 49 (1985), and our reconsideration of that action, *Memorandum Opinion and Order (Reconsideration Order)*, 59 RR2d 1355 (1986); *aff'd*, 1 FCC Rcd 24 (1986), HITN submits that the "Commission, by establishing comparative criteria favoring local applicants, clearly and specifically contemplated that nonlocal applicants would be entitled to participate in that comparative evaluation." In HITN's view, the local priority period was "established to enable local applicants to bolster their comparative credentials and allows them to present their best comparative posture during any comparative evaluation with applicants already on file, be they local or national." Were the Commission to do otherwise, argues HITN, and grant the mutually exclusive applications filed by local applicants without consideration of the merits of all the pending applications, including those of HITN and the other nonlocal applicants, it would be acting in direct contravention of Section 309 of the Communications Act as interpreted in *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945) and *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

5. As noted, we conclude that the staff correctly interpreted and properly applied our new ITFS policies and regulations in the instant case. HITN has erroneously interpreted our actions in the ITFS Rule Making proceeding and has misread the statements it refers to in support of its position. In *Order* at 57-59, we explicitly stated that only local applicants would be eligible for consideration during the applicability of an established "local priority period" and that nonlocal applicants were subject to dismissal without comparative consideration where a competing, mutually exclusive application by a local entity had been filed before the end of the period. *See* Section 74.932

(a)(1)(i) of the Rules. On reconsideration, nonlocal applicants were given an opportunity to reconstitute their applications to achieve a local status so as to be eligible for comparative consideration with local applicants. *Reconsideration Order* at 1365. HITN elected not to reconstitute its proposal so as to become a local applicant in Denver and, accordingly, was not entitled to comparative consideration with the pending local application of School District. As the staff correctly noted, HITN's arguments as to the legality of the establishment of the local priority itself, including the applicability of *Ashbacker*, were raised by HITN and others in the Rule Making context and were fully considered and rejected therein. *Id.* at 1361-63. We find no error in the staff's dismissal of HITN's nonlocal application following the staff's determination that School District was qualified for its requested facilities.

6. HITN also contends that the staff erred in granting waivers of the four-channel limitation rule (Section 74.902(d) of the Rules) to both University and School District. As a procedural matter, HITN maintains that an amendment filed by University in support of its initial request for waiver was untimely and should not have been considered. On the substantive merits, HITN asserts that the staff misapplied the four-channel limitation waiver standard as regards both University and School District, which places a high burden on applicants seeking waivers, particularly where a demand by others for ITFS stations exists. HITN states that the staff disregarded the applications of HITN and other nonlocal applicants that had requested channels. It further contends that the staff applied a lesser standard than should have been required to the waiver showings submitted by University and School District, affording undue weight to those applicants' proposed use of, and need for, the requested channels. Grant of the requested waivers, HITN claims, eliminated all available ITFS channels for future applicants seeking to provide additional, diversified programming in the area.

7. In *Order*, *supra*, we established guidelines and procedures for the filing of amendments to pending applications so as to permit applicants to bring their proposals into compliance with the newly adopted rules and policies governing the ITFS service. *Order* at 100-101. The new rules were comprehensive and necessitated that most applications, filed before the adoption of *Order*, be clarified and updated so as to permit, to the extent possible, their expeditious processing. In most instances, applicants were requested to submit their amendments within a specified time period, but additional information was also permitted to be filed later when requested by the staff to complete the processing of particular proposals as they were reached for consideration. A specific and more limited requirement was imposed on applicants seeking more than four channels in an area because this was an obvious and discrete category of applications on file that could be readily identified as requiring supplemental showings in virtually all cases. We were anxious, after having adopted the local priority period, to process pending and cut-off local applications in an expeditious manner and believed these procedures would assist us in fairly and reasonably achieving this end. Applicants requesting more than four channels were thus put on notice that applications lacking showings in support of waiver requests were subject to dismissal without further notification by the staff and without an opportunity to update their proposals. This requirement was imposed for the purpose of expediting application processing; it does not require rigid adherence where it is not essential to expeditious processing.

8. Following the adoption of *Order* and the local priority period, requests for reconsideration of most of the newly established rules were filed by numerous parties and, once again, the status of nonlocal applicants relative to competing local applicants was reopened. This altered our originally anticipated schedule for the commencement of the processing of pending, cut-off local applications that were in conflict with nonlocals and our amendment deadline became inconsequential. As noted, on reconsideration, nonlocals were permitted a period of time to reconstitute their proposals to achieve a local status and to be eligible for processing with other local applicants on file before, or at the end, of the local priority period. *Reconsideration Order*, *supra*. Thus, the information necessary to process affected local applications was no longer needed before that time.

9. HITN's contention that it was inappropriate to have considered the supplemental information submitted by University in support of its waiver request because of "untimeliness" is unpersuasive. Both University and School District had requested waivers in their initial applications. Moreover, the supplemental documentation was submitted well before the end of the local priority period.[4] Local applicants, if they desired and subject only to the cut-off rights of other local applicants, could have filed completely new proposals during that period. Thus, it was appropriate to consider supplemental data filed during the period in further support of existing local applications. Here, University and School District were the only two local parties that were then eligible for processing and who had resolved any claims of mutual exclusivity between themselves. The supplemental information was not "untimely" in that the deadline originally imposed was no longer relevant and the orderly processing of applications was not affected by our consideration of the additional data. We also note that the timing of this supplemental information and our acceptance of it has not prevented HITN, and other nonlocal applicants, from effectively participating in this proceeding. For these reasons, we find that the amendments were acceptable and properly considered by the staff.

10. The principal showing required by an applicant seeking waiver of the four-channel limitation rule involves a demonstration as to how the requested channels will be used for traditional ITFS purposes and why a lesser capacity than that requested would be insufficient to accommodate an applicant's needs. *See Report and Order* in MM Docket 83-523, 98 FCC2d 925, 932-33 (1984), and *Order* at 76-78. We stated that the waiver burden would be exceedingly high, particularly in areas where a large demand for channels exists. *Id.* The expressed interest in the requested channels as evidenced by the pending local and nonlocal applications was considered in assessing the showings submitted by University and School District. *See* staff letter of November 10, 1986, p. 3.[5] With respect to University, the staff found[6] that University has been an existing licensee of two channels since 1972; that more than twenty live classes per week are transmitted over its existing channels; that several courses in the past had to be cancelled because of insufficient ITFS capacity; and that its course telecast needs were expected to increase at the rate of 25% to 50% per annum. It was also pointed out that two of the requested channels were necessary and

would be significantly utilized to transmit engineering, computer science, and business courses which University currently lacked the capacity to air, and that the other four channels requested were necessary and would be significantly utilized to accommodate other proposed formal educational programming originating from its multiple campus sites. As to School District's proposal, the staff found[7] that the applicant had demonstrated that six of the ITFS channels would be used to serve the needs of kindergarten through the twelfth grades (K-12); that the other two channels would be utilized for post grade-school education, *e. g.* to meet unique educational needs of high school and college students and to provide training and recertification materials for faculty and administrators; and that 41-50 hours of course programming were proposed on each channel per week. School District's scheduling of its programs on its proposed instructional channels for grades K-12 and its proposed adult learning channels were reviewed and the applicant's explanations[8] for certain repetitive programming were found by the staff to be reasonable. In addition to these showings, the fact that both University and School District are public educational entities charged by the State or local government with the responsibility of providing for the educational needs of the student populace in their jurisdictions was also considered.

11. HITN's assertions to the contrary, we agree with the conclusion of the staff that both University and School District amply demonstrated that the requested channels would be fully used and were necessary for providing a wide-range of educational and instructional service to their diverse student populations. That the requested channels were also sought by other applicants and that they may represent, as claimed by HITN, the only remaining ITFS channels in Denver, does not diminish the adequacy of the comprehensive showings proffered by University and School District. Nor does grant of the four-channel waivers impede the further growth of a diversified ITFS service in Denver, for HITN, as well as any local or nonlocal entity, can participate in that process by developing, producing and supplying instructional programming for use by University and School District. *See Order* at 57-58. We find that the showings submitted in this case by the public educational entities responsible for assessing and responding to the educational requirements of their jurisdictions were sufficient to meet the high burden necessary to justify the requests for waiver of the four-channel limitation rule.

ITF

12. ITF, a nonprofit organization headquartered in Boulder, contends that the staff erred in concluding that ITF was not a local applicant in Denver, the community where it proposed ITFS facilities. ITF's primary disagreement is with the staff's interpretation of what constitutes a "metropolitan area" for the purpose of determining whether an applicant is "local." Section 74.932 of the rules, note 1. It contends that the staff's interpretation of what constitutes the "community, or metropolitan area" conflicts with the plain language in the rule and is inconsistent with other Commission rules and precedent, amounting to the adoption of a new definition without proper notice. It bases its argument primarily on its view that the "metropolitan statistical area ('MSA')" used by the U.S. Census Bureau was the only reasonable interpretation of "metropolitan area," and not the "urbanized area" analogy relied upon by the staff.

13. Section 74.932(a)(1) of the Rules provides, in pertinent part, that only local applicants can be considered for licensing during the local priority period. Note 1 to the rule defines a "local" applicant as one "that is physically located in the community, or metropolitan area where service is proposed . . . " and that an educational organization, such as ITF, "will generally be regarded as 'local' if the address of the organization's headquarters is located in the area where the facility is sought." The staff, in interpreting this rule, did not adopt a new standard, as claimed by ITF, but rather assessed and related the terms of the rule to the specific facts of the case before it. Its conclusion that the facts did not support ITF's claim that it is local in Denver is entirely consistent with the specific language of the rule and particularly when viewed within the entire context of the ITFS Rule Making proceeding.

14. The term "community" in the rule is more broadly defined by the term "metropolitan area" which was intended to afford flexibility and to prevent an overly restrictive application of the rule where specific facts warranted a broader interpretation. It recognizes that an applicant headquartered in a suburban community is, in fact, "local" to the metropolitan area of the major urban center. Here, no claim is made, and one is not likely to be sustainable, that Boulder is a suburb of Denver. The communities are separate and distinct, 25 miles apart, in different counties, and separated by rural areas. Moreover, ITF did not propose to provide service throughout an area encompassing both Denver and Boulder. Its proposal is limited to Denver with no service proposed in Boulder where ITF maintains its headquarters. Furthermore, the interpretation of "metropolitan area" by the staff is most appropriate when viewed in the context of the local priority period itself, where emphasis was given to preferring ITFS applicants that had the greatest local ties to a particular community. *Order* at 56. We were primarily concerned with giving control of ITFS facilities to entities best suited to ascertaining and meeting community educational and instructional needs, but made the rules general enough so as not to preclude suburban communities that might not otherwise be able to support their own facilities or which might be dependent upon the cultural, educational and instructional resources of the central urban city.[9] Further, the staff correctly concluded that the U.S. Census Bureau's MSA definition did not appropriately define what was intended by the rule. Definitions employed by other agencies can be helpful to us in interpreting our rules, as was done here by the staff, but they are not controlling. If we had intended "community or metropolitan area" to be synonymous with specific definitions used by the U.S. Census Bureau, or any other agency, we would have adopted the precise terminology and definitions provided by such agencies.[10] ITF may desire that we employ the U.S. Census Bureau's definition of MSA in this case,[11] but it is not required under the terms of the rule and ITF was clearly on notice that an organization headquarted in an urban community where it was not proposing service would not be considered "local" in a separate and distinct urban community where service was proposed. We conclude that the staff appropriately determined that ITF was not a local applicant in Denver.

15. The other issues raised by ITF concern whether School District is financially qualified and whether it violated Section 1.65 of the Rules by failing to report significant changes in information provided in its applications. According to ITF, School District's failure to allocate in its budget the specific funds needed for the construction and operation of its ITFS system undermines the availability of those monies. In addition, ITF argues that School District's divestment of its noncommercial educational broadcast station, KRMA-TV, and the budgetary restrictions now imposed by the Colorado State Legislature on that station negate the applicant's continued reliance on KRMA-TV for operational and programming support and should have been reported earlier to the Commission.

16. We disagree. ITF's assertion that School District has no line item in its budget which specifically authorizes funds for the construction and operation of its ITFS system does not raise a specific allegation of fact sufficient to show that a grant of the application would be prima facie inconsistent with the public interest. The establishment of the financial qualifications of a public educational entity proposing an ITFS system turns on whether that entity has reasonable assurance of the availability of the required funds and is not necessarily dependent on a definitively specified line item budget entry. Further, even assuming a prima facie argument had been made, on the basis of all the facts presented, we find that no substantial or material question of fact exists regarding the School District's financial qualifications. Of particular significance is the fact that School District was operating at the time of the grant of its applications with an approved budget exceeding250,000,000. While no specific appropriation in that budget was made for the proposed ITFS facilities, School District explains that prudent fiscal practices called for setting aside any required funds only in the fiscal years the construction permits would be awarded and construction commenced. Under the circumstances of this case, we believe that School District's decision to proceed in such a manner does not raise questions as to the validity of its certification that it is financially qualified. Unlike the situation in *Cityof New York Municipal Broadcasting System*, 59 FCC2d 737 (Rev. Bd. 1976), which is cited in support by ITF, School District has demonstrated by sworn statements from officials who oversee its budgetary process that specification of the necessary funds would be forthcoming.[12] Naomi L. Bradford, a member of the Board of Education and its former president who executed the School District's applications in early 1984, states that in so doing, "I was reflecting the commitment of the Board of Education to pursue the construction permits and, if successful, to construct and operate the facilities." Ms. Bradford further relates in her sworn statement that:

> It was the Board of Education's intention that the funds to construct and operate the ITFS facilities would be allocated out of our School District budget at the time the construction permits were granted and construction was ready to proceed. In view of the School District's financial capabilities and the Board of Education's commitment in this regard, we did not believe it was necessary, or even appropriate, to earmark funds by allocating them to an ITFS account prior to the time when construction would actually take place.

The January 30, 1987 sworn statement of the then-president of the Board of Education, Judith S. Morton, was also submitted by School District. "The Board of Education," avers Ms. Morton, "is committed to the effectuation of its plan to construct and operate ITFS facilities in Denver to be used for instructional television programming for children (K through 12) and adults.

The School District has the financial capability to provide for construction and operation of the facility out of its own funds." The unequivocal nature of these statements lead us to conclude, as did the staff, that the Board of Education's "commitment" is not illusory and can be relied upon by School District to establish its financial qualifications.[13] *See Los Angeles Unified School District*, 30 FCC2d 547 (Rev. Bd. 1971). Further, we are not persuaded to discredit the continued willingness of the Board of Education to fund the proposed ITFS system in accord with this "commitment," as well as the adequacy of School District's approved budget to accommodate the necessary expenditures, as urged by ITF, because no monies have been appropriated since the grant of School District's applications in November of 1986. As explained by School District, it would be unwise, in its view, to move forward with the expenditure of public resources until the instant dispute is finally resolved.[14]

17. As for ITF's assertions that the circumstances regarding KRMA-TV adversely impacted on School District's financial qualifications and should have been reported to the Commission pursuant to Section 1.65 of the Rules, we find that a prima facie case of a violation of Section 1.65 appears to have been presented. To the extent this information was relevant to School District's application, any substantial change needed to be brought to our attention. However, after reviewing all the pleadings and facts before us, we conclude that it was not necessary for School District to update its application. In particular, School District has demonstrated that these changes in circumstances were not actually relevant to its application. At the time it filed its applications, School District was the licensee of KRMA-TV and it proposed to coordinate and implement the requested ITFS system through the facilities of KRMA-TV. In December of 1986, however, School District filed an application seeking to assign the KRMA-TV license to Council for Public Television, Channel 6, Inc. (Council). That application was later approved and the transaction consummated on May 1, 1987. In its October 1987 action, the staff concluded that the divestment of KRMA-TV did not materially affect School District's financial qualifications and that it was not a substantial change warranting prior disclosure to the Commission. In part, that decision was premised upon the sworn statement of Council's president, Grant T. Alley, who averred that KRMA-TV had agreed to provide "programmatic and operational support" to School District "until June 30, 1987 and thereafter upon such terms and conditions as the parties may then determine." We find no error in the staff's rationale or conclusion with respect to these matters. Nor do we believe it appropriate to change that result by virtue of the state legislature's curtailment of instructional programming funding by KRMA-TV, an occurrence that ITF raises for the first time in its application for review. Even if assistance from KRMA-TV is now no longer available because of the state legislature's action, as alleged by ITF, we do not believe that this represents a change of circumstances requiring reporting by School District. As noted above, any assis-

tance subsequent to June 1987 was not assured, rather it was subject to negotiations between School District and KRMA-TV. In view of the unequivocal sworn statement of Ms. Morton as to School District's capacity to finance the construction and operation of the ITFS facilities *out of its own funds*, a statement made with knowledge of the agreement with KRMA-TV, we further conclude that this new matter does not raise a substantial or material question of fact relevant to our public interest determination.[15]

18. In view of the foregoing, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's rules, the applications for review filed by HITN and ITF ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] By this action, the following applications were also dismissed: National Conference on Citizenship for channels A1-A4, Denver (BPIF-840206DE); Bedford Stuyvesant Restoration Corporation for channels A1-A4, Golden/Denver (BPIF-840914FT); and Network for Instructional Television, Inc. for channels G1-G4, Denver (BPIF-830830DA). None of these applicants sought further review of the staff's action. Pursuant to a settlement agreement, the applications of Public Broadcasting Service for channels A1-A4, Denver (BPIF-820113MI) and School District for channels B1-B4, Denver (BPIF-840103DD) were also dismissed.

[2] HITN filed a "Motion for Extension of Time" to file its application for review and no party objected to the late filing of the pleading. The motion is granted and the application for review will be considered. HITN also filed a "Consolidated Reply" pleading which is the subject of motions to strike by University and School District. This pleading is not authorized by the rules (Section 1.115(f)). Moreover, it primarily reiterates matters that are otherwise considered herein.

[3] The applications of HITN and ITF were in conflict with School District's application for the D channels in Denver, and not with the applications granted to University. ITF's application for review is directed only at School District's proposal, ,while HITN directs its pleading to both School District and, as regards waiver of the four-channel limitation rule, University.

[4] HITN objects only to the untimelinessof University's showing which was submitted approximately six months after the time period established in *Order*. School District's showing was submitted one day late, with an explanation for the delay.

[5] A denial of the waiver requests would have permitted consideration of other applicants for channels requested by School District and University.

[6] *See* staff letter of November 10, 1986, and staff reconsideration letter of October 5, 1987.

[7] *Id.*

[8] Staff reconsideration letter of October 5, 1987; see affidavit of Dr. Agatha Temaat, School District's Opposition to HITN's Petition for Reconsideration.

[9] Instances cited by ITF where ITFS facilities have been granted to organizations not headquartered in the community applied for are inapposite. Those applications were granted prior to the establishment of the local priority period and, therefore, no determination was necessary as to whether they were "local" to the community or metropolitan area where the facilities were sought.

[10] Where we have intended to restrict our rules to demographically generated classifications used by other agencies we have specifically done so in other situations. *See , e. g, Report and Order* in General Docket No. 80-112, 94 FCC2d 1203, 1264 (1983); *Memorandum Opinion and Order on Reconsideration* in CC Docket No. 79-318, 89 FCC2d 58, 86-87 (1982), *Further Reconsideration*, 90 FCC2d 571, 577-79 (1982).

[11] Even the Census Bureau has different levels of MSA's which it uses for various purposes, *i. e.* primary metropolitan statistical area and consolidated metropolitan statistical area.

[12] It appears from the information before us that the governing body of School District is the Board of Education, which entity is responsible for reviewing and approving School District's proposed annual budgets and for adopting appropriation resolutions, specifying the monies allocated to certain general categories of funds and authorizing interfund transfers.

[13] On December 10, 1985, School District amended its applications, certifying that it was financially qualified and that the necessary funds were available for its use. ITF has also challenged the appropriateness of that certification since the Board of Education had not adopted the required appropriation resolution specifically allocating funds for that expenditure. As explained in the sworn statement of Carle E. Stenmark, School District's secretary-treasurer and deputy superintendent who executed the amendment, that financial certification was premised on "the Board of Education's capability and commitment to construct and operate the requested ITFS facilities out of regularly available School District funds." Further, Mr. Stenmark avers that that commitment, in his view, rendered the subsequent allocation of the necessary funds to an account for ITFS to a mere ministerial act, rather than a contingency on the availability of those monies. We find this explanation to be plausible, and we again note our determination that the "commitment" of the Board of Education to this project afforded School District reasonable assurance as to the funding of the proposed ITFS facilities.

[14] On March 23, 1988, ITF filed a "Supplement to Application for Review" in which it notes that the most recently adopted budget by School District (for calender year 1988) does not allocate funds for ITFS. For the reasons stated above, the fact that no line item in the budget authorizes monies for ITFS does not reflect unfavorably on School District's financial qualifications and in no way diminishes its continuing commitment to ITFS. Moreover, in a "Response to ITF Supplement," filed April 21, 1988, School District submits sworn statements from Edward Garner, the current President of the Denver Board of Education and from Velma Rose, Executive Director of Budgetary Services, among others. Mr. Garner confirms the previous statements of School Board officers "to the effect that the Board . . . remains committed" to constructing and operating ITFS facilities and that it will provide for this and move forward with the project once the permits "are finally affirmed" and not subject to "cancellation." Ms. Rose notes that School District operates in 1988 with a general fund budget in excess of$65,000,000 and that while the Board "must adopt priorities with respect to the retention of old programs and the creation of new ones . . . in cases where the [Board] has committed itself to projects of high priority, the School District has been able to allocate funds in its budget" and she perceives no reason why funds could not be allocated to construct and operate ITFS facilities.

[15] In its "Response to ITF Supplement," a sworn statement is submitted by Mr. Alley, dated April 6, 1988, in which he confirms Council's continuing commitment to a cooperative relationship between School District and KRMA-TV and for support by KRMA-TV as regards School District's ITFS operation.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Woodstock and Broadway, Virginia)

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1988; Released: October 31, 1988

By the Commission:

1. The Commission has before it for consideration an Application for Review, filed by Ruarch Associates (Ruarch) permittee of FM Station WAZR, Channel 240A, Woodstock, Virginia. Ruarch requests review of the *Memorandum Opinion and Order* (Memorandum) in which the Mass Media Bureau denied a petition for reconsideration of the action returning as unacceptable Ruarch's Petition for Rule Making.

2. Originally, Ruarch filed a petition for rule making seeking the substitution of FM Channel 241B1 for Channel 240A at Woodstock, Virginia, and modification of the license of Station WAZR(FM) to specify operation on the new channel. In order to accomplish this substitution Ruarch also proposed the substitution of Channel 226A for Channel 238A at Broadway, Virginia.

3. A Commission staff engineering analysis revealed that the proposed substitution at Woodstock could not be made in compliance with the Commission's minimum spacing requirements due to a 21 kilometer (13.1 mile) short spacing to Station WHUR-FM, Channel 242B, Washington, D.C. Consequently, Ruarch's petition was returned as unacceptable because it would be necessary to impose a 23.3 kilometer site restriction from Woodstock city reference coordinates to clear Stations WHUR-FM and WHTX(FM), Channel 241B, Pittsburgh, Pennsylvania. The greatest acceptable distance for the provision of a city grade signal for a Class B1 facility would be 23.2 kilometers.[1]

4. In its petition for reconsideration, Ruarch, using a different site from that first proposed, claimed that there is a site from which a predicted city grade contour can be placed over Woodstock.[2] Ruarch stated that the required 70 dbu signal could actually be placed over Woodstock from a distance of 23.4 kilometers. Ruarch also argued that, using actual terrain conditions along the radial between its proposed site and its community of license, a 70 dbu contour would encompass the entire community of license. Ruarch further argued that although the Commission typically relies upon average terrain calculations in allotment proceedings, the Commission is empowered to consider actual terrain characteristics when making channel allotments, citing *Oak Beach and Bay Shore, N. Y.*, 57 RR 2d 1275 (1985). Lastly, Ruarch argued that its proposal presented an even more compelling case than that in *Bay Shore* for Commission consideration of terrain data, because it was not seeking the allotment of a new channel, as in *Bay Shore*, but the upgrading of an existing facility. Therefore, Ruarch concluded, no other party could apply for the channel, and acceptance of its specific terrain data, based on a specific site, was appropriate. Ruarch further noted that from its specified site, its proposed upgraded facility would comply fully with our city coverage requirements and that it had obtained permission from the landowner and the FAA for use of the site.

5. In the *Memorandum*, the Bureau stated that the Commission does not use actual terrain conditions to predict signal coverage in allotment proceedings. Instead, we generally utilize average terrain figures which assume uniform elevation in all directions. The Bureau further stated that Ruarch's reliance on *Bay Shore* was misplaced. The Bureau noted that the Commission did not rely solely on actual terrain conditions in deciding to allot Channel 276A to Bay Shore. [3] It also noted that in *Bay Shore* we waived the rules requiring city grade coverage but in the instant case no waiver request was made, and that in *Bay Shore* the applicant established the unavailability of alternate transmitter sites, but in the instant case no such showing was made. Finally, the Bureau rejected Ruarch's contention that the required city grade signal would be placed at a distance of 23.4 kilometers, and that a signal at that distance would comply with our rules. Instead, the Bureau determined, using the Commission's standard prediction methods, that the predicted city grade signal fell short of the center of Woodstock by 0.1 kilometer. Because less than 50% of Woodstock would be served by the predicted signal, the Bureau found Ruarch's proposal unacceptable.

6. In its Application For Review, Ruarch first contends that the rejection of a figure of 23.4 kilometers for the distance to a predicted city grade signal for class B1 facilities constituted an erroneous finding as to a material issue of fact. Second, Ruarch argues that the Commission's decision in Woodstock conflicts with the precedent established in *Bay Shore*, where the Commission considered actual terrain data. Ruarch contends that the Commission's decision in *Bay Shore* is directly applicable, because no other use may be made of Channel 241 in the Woodstock vicinity, no alternative transmitter sites are available which will allow better signal coverage, and the proposal will generate a net increase in service to 118,620 persons. Finally, Ruarch contends that to the extent *Bay Shore* is not directly applicable, the Commission should nonetheless revise its general policy of not accepting actual terrain data in allotment proceedings in the limited circumstances presented by this case. Ruarch notes that the proposal is for an adjacent channel upgrade, and, if adopted, would not be made available for general application. Ruarch further notes that the proposal would not require a waiver at the application stage, and that it would not result in a sub-standard allotment.

DISCUSSION

7. After careful consideration of the pleadings in this case, we believe the application for review should be granted, and that the staff should accept the petition for rule making and issue a notice of proposed rule making to determine if Ruarch's proposed adjacent channel upgrade would serve the public interest. We specifically affirm the Bureau's earlier determination that, using standard prediction methods and the normal assumption in allotment proceedings of uniform terrain, Ruarch's proposal is unac-

ceptable. However, we believe that a narrowly limited exception to our general policy of assuming uniform terrain in allotment proceedings is warranted in this and similar cases.

8. We reject Ruarch's contention that *Bay Shore* compels the result in this case. *Bay Shore* differed from this case in a number of material respects. First, in *Bay Shore* we made a substandard allotment in order to provide a first local service that could not be otherwise provided. In this case, Ruarch only seeks to upgrade the class of a present allotment which fully complies with Commission rules. Although we recognize that public interest benefits do accrue from upgrades to facilities, the benefits that accrue are generally less than those from provision of a first local service, unless the upgraded facilities would provide first or second aural service to a substantial population. Second, in *Bay Shore* we found that there was no other possible use of the channel, whereas Ruarch has made no such showing.[4] Third, in *Bay Shore* we found that no other alternative transmitter sites were available and that the petitioner had presented sufficient evidence to enable the Commission to evaluate its requested waiver of the city grade coverage requirement. In this case, the petitioner has failed to show that no alternative transmitter sites are possible, and has not requested a waiver of the city grade coverage requirement. Therefore, *Bay Shore* is not dispositive.

9. Our decision to grant Ruarch's application for review is based on narrow grounds. Normally, the Commission does not evaluate specific terrain data in allotment proceedings. Instead, the Commission generally assumes that a station's city grade coverage contour is a circle with a defined radius from a hypothetical transmitter site. Thus, compliance with our city grade coverage requirement is determined by a simple distance calculation. If the far boundary of a community is farther than the length of the circle's radius from the closest hypothetical transmitter site, we will not make the allotment. At the application stage, however, the Commission recognizes that differences in the average elevation of terrain along radials from the transmitter site will affect the distance to a predicted contour. In determining whether the station provides adequate city grade coverage, at that stage the Commission will examine terrain along a radial from the transmitter site to the community of license, in accordance with our standard prediction methods.[5] In examining that radial, the Commission takes cognizance of the fact that if the average elevation as derived from our standard prediction methods along the radial to the community of license is generally less than the elevation along other pertinent radials from the transmitter site, the station's signal will extend farther along that radial than along other radials, and therefore farther than predicted using an assumption of uniform terrain. An applicant generally complies with our city grade coverage requirement if, based upon examination of the predicted distance to the city grade contour along the radial from its proposed transmitter facility, the Commission determines that the requisite signal strength will be supplied to the community of license. We do not undertake a similar analysis at the allotment stage, because we generally cannot determine what specific transmitter sites will ultimately be applied for, nor whether the petitioner will be the successful applicant.[6]

10. However, in this case the petitioner is not requesting a new allotment, but an upgrade to a higher class channel for an existing authorization. The Commission does not accept competing applications for FM licenses or permits upgraded to a higher class adjacent or co-channel. Thus, if the proposal is adopted, we would not make the amended allotment available for general application.[7] Moreover, the petitioner has taken the affirmative steps of securing assurances from the proposed sites' owner that the transmitter site will be available, and has obtained FAA approval for a tower at the proposed site. The petitioner has also submitted substantial evidence that, using our standard prediction method, but relaxing the normal assumption of uniform terrain, its proposed facilities will comply with our principal city coverage requirement. A staff analysis confirms that from the petitioner's proposed site, petitioner will provide city grade coverage at a distance well beyond the community of Woodstock. Although we reiterate that the assumption of uniform terrain at the allotment stage is generally appropriate, we believe it would elevate form over substance to apply that assumption here, where the petitioner has taken the affirmative steps necessary to allow us to evaluate a specific site, and our rules insure that petitioner will be the only applicant for the allotment.[8]

11. In light of the above, we believe petitioner has demonstrated that all of Woodstock can be provided with a city grade signal. Thus, we find that petitioner has provided a basis for accepting its petition for Rule Making. Petitioner's Application for Review is hereby granted, and the staff is directed to initiate a rule making proceeding to determine if grant of the proposal would serve the public interest.

12. Accordingly, IT IS ORDERED, That the Application for Review filed by Ruarch Associates, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] *See* 47 CFR §§ 73.315(a), 73.333.

[2] The data originally submitted by the petitioner was for a site, at coordinates 38-44-36 and 78-45-18, 26.3 kilometers from Woodstock. The new coordinates, at 38-45-29 and 78-43-36, are for a site 23.4 kilometers from Woodstock. There is a difference of 2.9 kilometers between the first and second proposed sites.

[3] In *Bay Shore* we emphasized that the proposal to allot Channel 276A to Bay Shore, New York, was both unique and meritorious. The only site complying with the Commission's spacing requirements and local environmental concerns was located on the Fire Island Lighthouse. From this site, due to limitations placed on the transmitter height, the predicted 70 dbu signal would encompass only 45% of Bay Shore. We noted that the area between the lighthouse and Bay Shore consisted of water and the 70 dbu signal could be expected to extend further than predicted and possibly encompass Bay Shore. We also determined that the proposal would provide a first local service to a community of over 36,000 in population. We further pointed out that the proposal represented the only known possible use of this channel, no

alternative transmitter sites were available, and the proposal was consistent with efforts to restore and preserve the Fire Island Lighthouse.

[4] Indeed, in the rule making proceeding that will be initiated to determine if Ruarch's facilities should be upgraded, it may be concluded that the use of Channel 241 or an adjacent channel at another community would better serve the public interest.

[5] *See* 47 CFR § 73.313(d)(1)-(3). *See also* 47 CFR § 73.311(a),(b)(3).

[6] *See Greenwood, SC*, MM Docket No. 86-32, FCC 88-199 (released July 5, 1988).

[7] *See* 47 CFR § 1.420(g).

[8] Petitioners wishing in the future to take advantage of this exception to our normal assumption of uniform terrain should submit, in their petition for rule making, a full showing as to the terrain between the proposed site and their community of license, in accordance with our rules. In addition, petitioners should submit the same terrain data for eight radials from the transmitter site normally submitted with an application, in order to allow the Commission to confirm that the facility would comply with our maximum height above average terrain requirements. Finally, petitioners should indicate that they have reasonable assurances of site availability for the proposed site.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-388

In the Matter of

Amendment of the Commission's
Rules for Rural Cellular Service

FIFTH REPORT AND ORDER

Adopted: October 13, 1988; Released: November 1, 1988

By the Commission:

INTRODUCTION

1. On June 30, 1988, we released the *Fourth Notice* [1] in this proceeding which proposed to amend our rules governing service to the area within each cellular Rural Service Area (RSA) that is not part of the Cellular Geographic Service Area (CGSA).[2] The term "fill-in application" refers to an application to serve such an area.

2. In the *Fourth Notice* we proposed and sought comment on the following issues: (1) whether we should establish a five-year fill-in period for RSAs, similar to that which we established for Metropolitan Statistical Areas (MSAs) or a different period; (2) whether we should measure the fill-in period from the date of the grant of the original authorization of each system; (3) the extent to which the fill-in period and the right to expand should be transferable; and (4) whether we should amend Section 22.31(a)(1) [3] of the Rules to provide that all applications for each RSA be mutually exclusive regardless of whether their proposed CGSAs overlap.

DISCUSSION

3. Twenty-eight comments and seven replies were filed by potential applicants, engineers, law firms and telephone associations.[4] After thoroughly considering all of the comments and replies, in this order we adopt the fill-in policy set forth in *Fourth Notice* with certain clarifications. We establish a period of five years during which an RSA licensee may file applications to expand its original CGSA or propose other CGSAs within the RSA without being subject to competing applications. This period will be measured from the date of the grant of the original authorization of each initial system in the RSA. We also adopt our proposal to allow a transferee of an authorized system to accede to the fill-in rights of the original licensee. Finally, we adopt our proposal to amend Section 22.31(a)(1) of the Rules to provide that all applications filed for each RSA be considered mutually exclusive regardless of whether CGSAs overlap.[5]

4. *Fill - In Period.* Most commenters support our proposal to allow the original RSA licensees a period of five years to file applications for the unserved portion of the RSA without being subject to competing applications. However, Metro Mobile and CTI state that a five-year period is too long and would give licensees too little incentive to expand their CGSAs promptly. CTI contends that licensees will serve only the most densely populated areas, and this would frustrate government policies to develop the federal interstate highway systems which often traverse unpopulated areas.

5. We have previously concluded that it is in the public interest to allow cellular system operators the flexibility necessary to modify their cellular system "in response to growing or changing demand . . . ."[6] We have stated that a fill-in policy "promotes the expeditious, orderly processing of cellular applications and prevents the 'regulatory paralysis' that could ensue if these areas were open to unrestricted applications at the same time that we are attempting to complete the nationwide licensing of cellular service."[7]

6. MSA licensees are permitted to file fill-in applications to serve areas outside of their CGSA, but within the MSA, for a period of five years from the date of the first construction authorization in the market without being subject to competing applications.[8] Thereafter, non-licensees may file applications for unserved portions of the MSA. We adopted a five-year period for MSAs because we concluded that: 1) where there was a wireline headstart, the period would provide nonwireline carriers with sufficient opportunity to ascertain the necessary modifications that result in CGSA expansion based on prior modifications by wireline carriers and their own resale activities; 2) any technical problems related to site locations and terrain most likely would occur in the early part of the construction period and that the remainder of the five-year period was adequate to remedy such problems; and 3) the five-year period, including the construction period, gives licensees time to identify unpredicted demand outside the CGSA or other changing demand patterns that might require CGSA expansion.[9]

7. Based upon the support in the record and our experience with MSAs, we adopt the proposal in the *Fourth Notice* to establish a five-year fill-in period for RSAs similar to that which we established for MSAs. We believe that a five-year period is necessary to allow the RSA licensees to assess: 1) the need for modifications in response to any headstart; 2) the technical changes that may be necessary in order to best serve the RSAs; 3) the developing demand for the use of cellular radio generally, and, in particular, to provide fixed service to residential users on more than an incidental basis, as well as the amount of existing conventional mobile telephone service that will migrate to cellular; and 4) factors such as unique demographics and lack of pent-up demand due to conventional mobile telephone service in less populous areas.

8. Metro Mobile and CTI argue that a five-year period may be too long and may delay service to the public. We realize there may be some delay. However, a period of less than five years could result in the construction of uneconomical systems due to business decisions made too hastily under the pressure of the lapse of fill-in rights, which could also delay service. Further, some commenters asserted that different demographic and other characteristics of RSAs warrant a longer period than for MSAs. But these factors are offset by the fact that RSA licensees have benefitted from the technical experience gained in implementing MSA systems. In addition, a fill- in period longer than five years might deprive some areas of service if the initial RSA licensee has decided not to provide

service to those areas. After balancing all these factors, we find that provision of a five-year period will ensure the quickest service to the public.

9. *Measurement of the Five - Year Period.* Most of the commenters, both wireline and nonwireline, support our proposal to measure the five-year fill-in period from the date of the grant of the original authorization for each system in the RSA. However, several commenters representing wireline interests argue that it would be more equitable to measure the fill-in period from the grant of the second authorization in each market. Specifically, they state that if there are different fill-in deadlines: (1) the second-licensed carrier might defer expansion in order to benefit from its competitor's experience; and (2) the first-licensed carrier will be unable to compete with the second-licensed carrier because it alone will be subject to competing applications for the duration of the uneven expansion period.

10. We recognize that under our proposal, a second-licensed carrier, as a reseller within an RSA, gains valuable knowledge of the necessary modifications to its system by observing the CGSA expansion activity of the first-licensed carrier.[10] In addition, the first-licensed carrier has benefitted from its headstart during the time in which the second-licensed carrier is not yet licensed to provide service. If we measure the fill-in period from the grant of the second authorization in each market, the first- licensed carrier will gain the additional advantage of having a longer fill-in period to expand its system. Therefore, after considering the comments on this issue, we adopt the proposal in the *Fourth Notice* to measure the five- year fill-in period from the date of the grant of the original authorization for each system in the RSA.

11. *Transferability of RSA Fill - in Rights.* Under our proposal, if the original licensee/grantee (or its assignee or transferee) transfers its entire RSA authorization, consisting of one or more CGSAs, to another party, the fill-in period and the exclusive right of expansion without competing applications transfers with the authorization. However, if the licensee/grantee transfers *less* than its total authorization to another party, that transferee will not obtain the exclusive right to expand the areas within the RSA that are not part of the CGSA unless the transferee obtains a signed statement transferring such rights from the licensee/grantee.[11] All the commenters support our proposal.[12] Therefore, for the reasons set forth in the *Fourth Notice* and below, we are adopting it.

12. CTIA suggests that we clarify our transfer policy. CTIA states that we should permit each RSA licensee/grantee to transfer its fill-in rights without having to transfer any of its CGSAs. Accordingly, the transferor would not have to obtain an additional authorization for the area it seeks to transfer; an authorization would be required only when the transferee filed its application to serve the area agreed upon between the parties. In this way, CTIA states, the Commission could avoid the expense and delay of a two-step regulatory process.

13. We decline to adopt CTIA's proposal at this time. Under CTIA's plan, the transferor could transfer its fill-in rights to a second party without transferring any of its CGSAs and subsequently transfer all its CGSAs to a third party. Unless we required some public disclosure of the transaction between the transferor and the second party, the third party would be unable to ascertain the extent of its fill-in rights within the RSA. Thus, under the current scheme, CTIA's plan would be unworkable.

14. *Amendment of Section 22. 3l (a) (l) of the Rules.* Only one commenter, Centel, objects to our proposed amendment of Section 22.3l(a)(l). Under the proposal, all applications for each RSA will be deemed mutually exclusive whether or not their proposed CGSAs overlap. Centel urges us to treat cellular applications as mutually exclusive only if they propose overlapping CGSAs. It states that such multiple licensing will: (1) expedite service to the public by allowing applicants to serve the most extensive geographic area; and (2) provide service more efficiently by allowing carriers in adjacent MSAs to serve portions of an RSA as adjuncts to their MSA systems. Centel also states that determining mutual exclusivity will not tax the Commission's resources if the burden is placed on applicants who are not chosen in the lottery to demonstrate that their applications are not mutually exclusive with the lottery winner.

15. We have reviewed Centel's plan and we believe that initial licensing of multiple entities in the RSAs would generally not be in the public interest. First, a multiple licensing scheme would encourage applicants to propose artificially expanded CGSAs to avoid foreclosure from the RSA or subsequent lotteries. Second, we believe that multiple licensing would result in substantial administrative delays, which will slow service to the public. Even if an applicant demonstrates that its proposed CGSA does not overlap the CGSA of the lottery winner, it may overlap another applicant's CGSA, which overlapped the winner's CGSA thereby making it mutually exclusive with the winning application. Thus, placing the burden on applicants to demonstrate that their applications are not mutually exclusive with the lottery winner would not relieve the Commission of having to employ considerable staff resources to review the claims of the applicants and to resolve disputes over mutual exclusivity. Therefore, we amend Section 22.3l(a)(l) of the Rules as proposed in the *Fourth Notice*.

16. *Further Clarifications of the Fill - In Policy.* At the suggestion of several commenters, we wish to clarify that the five-year fill-in policy will not operate to preclude parties from entering into full settlement agreements.[13] Where a settlement group is authorized to provide service in a particular RSA, each party to the settlement agreement could become a licensee of a segment of the RSA in accordance with the agreement. As such, each party would be entitled to the protection of the entire fill-in period in its segment.

REGULATORY FLEXIBILITY ACT - FINAL ANALYSIS

17. *Need For and Purpose of Rules.* This action will adopt Commission policy for accepting applications to serve areas within RSAs which remain unserved after the grant of the original authorizations in each system. This action is expected to promote efficient and expedient authorization of cellular service to RSAs and an orderly process to meet this objective.

18. *Issues Raised by the Public in Response to the Initial Analysis.* None.

19. *Alternatives that Would Lessen Impact.* We have considered alternative approaches to our fill-in application policies. We believe that the alternatives to our proposed fill-in policy, described herein, would be difficult to administer and would impede the implementation of service in RSAs in the most efficient and expeditious manner. We

have found no alternatives that will provide comparably efficient and orderly processing procedures in the licensing of cellular service.

ORDERING CLAUSES

20. Authority for this Rule Making is contained in Sections 1, 4(i) and (j), 301, 303 and 309 of the Communications Act of 1934, as amended.

21. Accordingly, IT IS ORDERED, that Part 22 of the Rules IS AMENDED as specified in the Rules Section appended to this order. The amendments adopted and the policies established in this Order for cellular licensees to expand their CGSAs within the RSA will become effective **December 16, 1988.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments

Joint Comments (Bluffton Telephone Company, Inc., Chesnee Telephone Company, Inc., Chester Telephone Company, Farmers Telephone Cooperative, Inc., Fort Mill Telephone Company, Inc., Hargray Telephone Company, Heath Springs Telephone Company, Home Telephone Company, Inc. Lockhart Telephone Company, Norway Telephone Company, Inc., Palmetto Rural Telephone Cooperative, Inc., Piedmont Rural Telephone Cooperative, Inc., Pond Branch Telephone Company, Inc., Ridge Telephone Company, Inc., Ridgeway Telephone Company, Rock Hill Telephone Company, Inc., Sandhill Telephone Cooperative, Inc., and West Carolina Rural Telephone Cooperative, Inc.)

Joint Comments (Odin Telephone Exchange, Inc., Wabash Telephone Company Inc., Egyptian Telephone Cooperative Association, Shawnee Telephone Company, Inc., Hamilton County Telephone Cooperative, Schuyler Telephone Company, and Ardmore Telephone Company.)

Joint Comments (Fisher, Wayland, Cooper and Leader; Pierson, Ball & Dowd; and Blooston & Mordkofsky.)

Joint Comments (Consolidated Telephone Company, Great Plains Communications, Inc., Hamilton Telephone Company, Hooper Telephone Company, Northeast Nebraska Telephone Company and the Lincoln Telephone and Telegraph Company)

ALLTEL Mobile Communications, Inc.

Bell Atlantic Mobile Systems, Inc.

BellSouth Corporation

Cellular Telecommunications Industry Association (CTIA)

Cellular Corporation

Cellular, Inc.

Centel Cellular Company (Centel)

Contel Corporation

Communications Transmission, Inc. (CTI)

GTE Mobilnet, Inc.

Lincoln Telephone and Telegraph Company (Lincoln)

McCaw Cellular Communications, Inc.

Metro Mobile CTS, Inc. (Metro Mobile)

National Association of Regulatory Utility Commissioners

National Telephone Cooperative Association

NYNEX Mobile Communications Company

Organization for the Protection and Advancement of Small Telephone Companies

PacTel Cellular

Pioneer Telephone Cooperative, Inc.

Providence Journal Telecommunications, Inc.

Rochester Telephone Corporation

Telocator

United States Cellular Corporation

United States Telephone Association

Reply Comments

BellSouth Corporation

Cellular Telecommunications Industry Association

GTE Mobilnet, Inc.

McCaw Cellular Communications, Inc.

National Telephone Cooperative Association

NYNEX Mobile Communications Company

Telocator

APPENDIX B

AMENDMENTS TO PART 22 OF THE COMMISSION'S RULES

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 22 continues to read as follows:

Authority: Sections 4,303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303).

Part 22 - Public Mobile Service

2. Section 22.31 is amended by revising paragraph (a)(1) and adding new paragraph (f) to read as follows:

(a) * * *

(l) In the Domestic Public Cellular Radio Telecommunications Service, applications shall be considered mutually exclusive if their proposed Cellular Geographic Service Areas (CGSAs) overlap in such a way that a grant of one would preclude the grant of one or more of the other applications, except that applications for the same Rural Service Area (RSA) will be considered mutually exclusive regardless of whether their CGSAs overlap . . . .

* * * * *

(f) *Rural Service Areas.* The provisions of this subsection shall not apply to initial applications to serve a Rural Cellular Area in the Domestic Public Cellular Radio Telecommunications Service. Applications by entities other than licensees or grantees for a particular RSA to serve unserved areas outside the presently authorized CGSA but within the Rural Service Area (RSA) will not be accepted for five years from the grant of the original construction authorization of each system in an RSA. During this five-year period the original licensee will be authorized to expand its system into unserved areas of the RSA. If the original licensee/grantee transfers its *entire* RSA authorization, consisting of one or more CGSAs to another party, the remainder of the five-year period and the exclusive right of expansion without competing applications transfers with the authorization. However, if the licensee/grantee transfers *less* than its total original authorization, to another party, the transferee will not obtain the exclusive right to expand the areas covered by the transferred authorization unless the transferee obtains a signed statement transferring such rights from the licensee/grantee. After the five-year period has expired, the provisions of Section 22.31 (a)(1) will apply.

FOOTNOTES

[1] Amendment of the Commission's Rules for Rural Cellular Service, *Fourth Notice of Proposed Rule Making*, 3 FCC Rcd 4050 (1988) (*Fourth Notice*).

[2] The CGSA is the area within an RSA that the applicant proposes to serve.

[3] In the text in paragraph 11 of the *Fourth Notice*, numbers were inadvertently transposed so that the reference to the Section being amended indicated Section 22.13(a)(l) and not Section 22.3l(a)(l). The Rules Section correctly identified the section we proposed to amend.

[4] *See* Appendix A for a listing of the commenting parties. Throughout the remainder of this order we will use the abbreviations contained in the Appendix.

[5] Section 22.3l(a)(l) currently specifies that cellular applications will be considered mutually exclusive only if their proposed CGSAs overlap in such a way that grant of one would preclude the grant of another. We have waived this provision of the Rules for purposes of the filing of RSA applications during the pendency of this proceeding. *See Fourth Notice* at para. 11 n. 13.

[6] *Lottery Reconsideration Order*, 58 Rad. Reg. 2d (P&F) 677 (1985) at 688. *See also Cellular Communications Systems*, 86 FCC 2d 469, (1982) at 509, *appeal dismissed sub nom. U. S.* v. FCC, No. 82 1526 (D.C. Cir. 1983); and *Lottery Order*, 98 FCC 2d 175 (1984) at n. 81.

[7] *Lottery Reconsideration Order*, 58 Rad. Reg 2d (P&F) at 688.

[8] *See Amendment of the Commission's Rules for Rural Cellular Service, Second Report and Order*, 2 FCC Rcd 2306 (1987) *(Second Report and Order)*.

[9] Id. at 2308.

[10] In the *Second Report and Order*, we adopted a proposal to measure the fill-in period from date of the first authorization in the MSAs. At that time, we did not anticipate the time difference which would result in wireline and non-wireline authorizations in some markets. Accordingly, it appears that measuring the fill-in period from the date of the first authorization could seriously inhibit the second-licensed carrier's expansion rights in some markets.

[11] *See Fourth Notice* at para. 10.

[12] Lincoln proposes that we discourage trafficking by promulgating a rule that would would extinquish nonwireline RSA fill-in rights if the authorization were transferred more than once. We reject Lincoln's proposal because we believe our existing rules are adequate to prevent trafficking in cellular authorizations. See 47 C.F.R. Section 22.40(b).

[13] In the *Third Report and Order* in this proceeding, we provided that the parties to full market settlements (contemplating the grant of more than one application in the RSA) will be permitted to partition the RSA into segments. Amendment of the Commission's Rules for Rural Cellular Service, *Third Report and Order*, FCC 88-155, 64 Rad. Reg. 2d (P&F) 382, released May 18, 1988 at n. 21.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN TELE-
COMMUNICATIONS, INC.

Petition for Revocation of
Operating Authority

MEMORANDUM OPINION AND ORDER

Adopted: October 20, 1988; Released: November 1, 1988

By the Commission:

I. BACKGROUND

1. Before the Commission is a "Petition for Revocation of FCC Operating Authority for WTCI" (Petition), dated November 5, 1987, filed by TeleSTAR, Inc. (TeleSTAR) and its principals. The Petition requests that the Commission revoke the radio authorizations of Western Tele-Communications Incorporated (WTCI).[1] Numerous responsive pleadings have been filed.[2]

2. TeleSTAR alleges that WTCI violated the Communications Act and the Commission's Rules by constructing and/or operating three microwave transmission systems prior to receiving Commission authorization. [3] TeleSTAR also maintains that WTCI engaged in misrepresentation with respect to two of these systems. TeleSTAR further alleges that WTCI violated unspecified local and environmental regulations concerning the construction of towers and antennae with respect to one of these systems.[4] WTCI denies that it engaged in any unlawful premature construction or operations with respect to all three systems. It also denies TeleSTAR's other allegations.[5]

3. For the reasons discussed below, we deny TeleSTAR's petition for revocation of WTCI's authorizations.

A. *Hooker - Redding, California*

4. TeleSTAR claims that WTCI unlawfully commenced construction of its Hooker-Redding network prior to receipt of Special Temporary Authority (STA) for such construction. The STA, according to TeleSTAR, was granted on May 19, 1987. TeleSTAR claims that WTCI commenced construction "sometime in April, 1987." Petition at 7. In support of this allegation, TeleSTAR directs our attention to the fact that WTCI filed a building permit application on March 31, 1987. Petition at Exhibit A.8. Additionally, TeleSTAR submitted a statement from a witness who says that he first observed construction at the site on May 5, 1987.

5. While TeleSTAR focuses on WTCI's STA,[6] granted on May 15, 1987 (not May 19, as alleged), WTCI responds (and our records confirm) that WTCI's underlying construction permit applications for the path were granted on April 16, 1987. TeleSTAR has presented no evidence suggesting that construction began before that date. WTCI's March 31 building permit application is not evidence that construction commenced prior to April 16. Any construction on May 5 was obviously permissible under the April 16 construction permit. Accordingly, and in light of WTCI's statement that it did not commence construction until after TeleSTAR's claim of premature construction with respect to this network, we conclude that there was no premature construction on this route.

B. *Sioux Falls - Sodrac (South Dakota)*

6. With respect to WTCI's Sioux Falls-Sodrac network, TeleSTAR makes several allegations pertaining to construction and operation, each of which we will discuss in turn. First, TeleSTAR alleges that tower construction commenced on June 29, 1987, two weeks before WTCI filed an application for the path with the Commission. In its Opposition, WTCI states that it was not involved in the construction of the customer-owned tower at the South Dakota Racing Club (Sodrac) receive site. WTCI explains that it was the responsibility of its customer, Sodrac, which owned the tower, to make available to WTCI a tower for the placement of WTCI's receive antenna. In reply, TeleSTAR points out that, in contrast to WTCI's claim that Sodrac owned the tower, in response to item 25(b) of its application (Form 435), WTCI indicated that it owned the facilities at Sodrac. Petition at Exhibit B.5. According to TeleSTAR, whatever the true facts regarding ownership of the tower, WTCI has engaged in misrepresentation, either in its application or in its Opposition.

7. In response to the General Counsel's request for additional information on this matter, WTCI submitted, inter *alia*, a letter from Sodrac confirming that Sodrac does in fact own the tower at the receive site.[7] To the extent any unauthorized tower construction occurred, it was thus the responsibility of Sodrac, not WTCI. Contrary to TeleSTAR's suggestions, our rules imposed no burden on WTCI to ascertain, prior to erecting its antenna on Sodrac's tower, whether Sodrac had the requisite authorization for construction of the tower.[8]

8. In response to TeleSTAR's allegation that WTCI engaged in misrepresentation by answering "yes" to a question involving ownership of station facilities, we note that in its letter submitting additional information, WTCI explained that it assumed Item 25(b) contemplated a yes answer if the licensee was to have ownership or control over the active or radiating equipment on the proposed path or system -- namely, the transmitters, receivers, antennas and associated waveguide equipment, but not the towers or buildings used by the station. This interpretation is incorrect. In light of Sodrac's ownership of the tower, WTCI should have indicated, in response to Item 25(b), that its customer (Sodrac) owns the tower. However, this mistaken interpretation and the resulting incorrect answer do not constitute misrepresentation or lack of candor by WTCI. As we have previously made clear, unless there is evidence showing "deceptive intent," we will not find that misrepresentation or lack of candor has occured. *See Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). The "bare existence of a mistake" in an application, "without any indication that the licensee meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepresentation or raise a substantial and material question of fact." *Kaye - Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979). Thus, in the absence of any

evidence of deceptive intent regarding WTCI's mistake, we conclude that there has been no misrepresentation or lack of candor.

9. Second, TeleSTAR alleges that the network became operational as early as July 9, 1987, when a race was televised over the network. This, according to TeleSTAR, was two months before WTCI received its FCC authorization. Contrary to TeleSTAR's allegations, WTCI had authority to operate facilities on the Sioux Falls-Sodrac path prior to its operation of the system on July 9, 1987. As reflected in the Commission's files, more than seven years ago, on June 17, 1981, WTCI was granted blanket Temporary Fixed Authority for Point to Point Microwave Service.[9] Pursuant to Section 21.708 of the Rules, 47 C.F.R. §21.708, WTCI was required only to notify the Commission of its intent to commence temporary fixed operation at particular sites before commencing operation at them. This is precisely what WTCI did, on June 17, 1987, by indicating that it intended to use the Sioux-Falls to Sodrac path between July 1, 1987 and October 1, 1987. Opposition at Attachment D.[10]

10. TeleSTAR asserts, however, that even if WTCI had temporary fixed authority, "it would have been an abuse of the Commission's regulations to have been issued." Reply at 1-2, n. 3. TeleSTAR contends that WTCI was aware that the network was to be used as a permanent facility and thus the grant of temporary fixed authority violated Section 21.707(a)(1), which states that, "services that are initially known to be longer than six months duration shall not be provided under a temporary fixed license." 47 C.F.R. §21.707(a)(1). Further, TeleSTAR argues WTCI violated Section 21.708(a)(8) of the Rules, which states that, "where notification contemplates . . . service for a period longer than 90 days, the notification shall contain a showing as to why application should not be made for a regular license." 47 C.F.R. §21.708(a)(8).

11. We conclude that WTCI properly used its Temporary Fixed Authority for this path. As indicated in its Opposition, WTCI was initially only testing this service for its customer. Therefore, WTCI would not have known, at the time of its June 17, 1987 notification, whether it would become a permanent operation, in use for more than six months. *See* Opposition at 4. Moreover, in its notification, WTCI indicated that it intended to use the facility from July 1 to October 1. While this three-month period covered 92, rather than 90 days, we believe that WTCI's intent to provide service for three months substantially complied with the 90-day rule, especially in light of the fact that it did file for a "regular license." Indeed, its request for permanent authority was granted on August 27, 1987, before the expiration of the 90 days. Thus it used its temporary fixed authority at Sodrac for only 58 days.

12. Third, TeleSTAR asserts that WTCI erected a "major EPA impacted project without local zoning approval." Petition at 7. While we cannot determine from TeleSTAR's allegations what specific violations of local building and zoning laws allegedly occured, we note that only three classes of non-FCC misconduct are considered in evaluating character qualifications: 1) adjudicated fraudulent statements to "another governmental unit"; 2) criminal convictions involving false statements or dishonesty; and 3) adjudicated violations of anticompetitive or antitrust laws in connection with station-related misconduct. *See Policy Regarding Character Qualifications In Broadcasting Licensing*, 102 FCC 2d 1179, 1195-1201, *on reconsideration*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association of Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987).[11] TeleSTAR has presented no evidence of misconduct by WTCI falling within any of these categories.

13. Finally, to the extent that TeleSTAR raises environmental concerns, we are unable to rule on them because we cannot ascertain what they are from TeleSTAR's vague and unspecific passing reference. *See* Petition at 7.

C. *Spokane - Coeur d' Alene, Washington - Idaho*

14. TeleSTAR contends that WTCI commenced construction of its repeater facility at the Low Blossom site on its Spokane-Coeur d'Alene route and installed antennae at two end locations for the network prior to September 2, 1987, the effective date of WTCI's STA for this path.[12] As evidence of the alleged improper premature construction at Low Blossom, TeleSTAR submitted a statement from an individual who says he was employed to construct a road at the site in the "spring of 1987." Reply at Attachment AA.7. This witness further states that he saw the pouring of concrete foundations on August 17 and that the block walls for the transmitter building were almost completed "about the 25th of August." *Id.*

15. WTCI responds by asserting that while it did in fact commence some construction prior to the effective date of the STA for the Coeur d'Alene to Spokane network, it undertook only such construction as is permitted by the Commission's policies and regulations. In his affidavit, WTCI's construction manager for the Spokane-Coeur D'Alene system states that, prior to the September 2, 1987 authorization date, only the following activity was undertaken: the repeater site at Low Blossom was cleared by the end of August; the floor slab was poured on August 27; and masonry work for the walls of the transmitter building at the repeater site was started on September 1. Motion to Strike at Attachment A.

16. While Sections 21.3(b) and 21.7(a) of our Rules prohibit an applicant from commencing station construction prior to receipt of Commission authorization for such construction, the prohibition on premature construction is not absolute. We have permitted the following steps to be taken prior to the receipt of construction authorization: site clearance; pouring of concrete footings for a tower; installation of a tower base and anchors; installation of a new power line; purchase and on-site storage of radio equipment; and construction of a transmitter building and other preliminary steps not having an "intrinsic" radio communications use related to the proposed facility. *See Christian Broadcasting of the Midlands, Inc.*, 103 FCC 2d 375 (1986), *reconsideration denied*, 2 FCC Rcd. 6404 (1987); *King Country Broadcasters*, 55 RR 2d 1591, 1592 (1984), *overruled on other grounds, Christian Broadcasting of The Midlands Inc.*, 103 FCC 2d 375 (1986), *reconsideration denied*, 2 FCC Rcd. 6404 (1987); *Patton Communications Corporation*, 81 FCC 2d 336 (1980); *KLOC Broadcasting Co.* 4 F.C.C. 839 (1966); *Childress Broadcasting Corporation*, 24 RR 2d 669 (1962). In light of these standards, we conclude that WTCI's activities at the Low Blossom site constituted permissible pre-authorization construction.

17. With respect to the placement of antennae at the Spokane and Coeur d'Alene sites, WTCI's construction manager states in his affidavit that construction at the Spokane terminal was first commenced on October 2, 1987, and that construction at the Coeur d'Alene site was

not started until September 10, 1987, both after the grant of the STA on September 2, 1987. TeleSTAR has provided no support for its allegation of premature construction at Spokane other than a statement that because the building site already had many antennae on its roof, one more could have been easily camouflaged. Reply at 10. This statement does not suggest any premature construction in fact existed, especially in light of WTCI's affidavit to the contrary. As to the Coeur d'Alene site, TeleSTAR provides statements from witnesses who claim to have seen the construction of a tower and antenna in "August or September," or "during the summer of 1987." Reply at Exhibits BB.3, BB.4. The statements do not demonstrate that construction began prior to September 2 and indeed are not inconsistent with WTCI's affidavit that installation in fact commenced on or after September 10. Accordingly, we deny TeleSTAR's claim of premature construction with regard to those sites.

18. Finally, TeleSTAR contends that the circumstances surrounding the issuance of the STA for this route suggest complicity between the Commission and WTCI. Specifically, TeleSTAR alleges that the Commission, in an attempt to help WTCI cover up premature construction, supplied WTCI with an STA retroactive to the application date. Reply at 3. TeleSTAR has characterized inaccurately the circumstances surrounding the grant of the STA. In an effort to provide service to the public expeditiously, in light of the exigencies often surrounding requests for an STA, Commission staff often verbally grant STAs upon receipt and initial review of the written application. The effective date of the grant in these circumstances is the date on which verbal authorization is granted. This date is later reflected in the written STA, which serves merely as the formal confirmation of the verbal grant. This is precisely what occurred with respect to the Spokane-Coeur d'Alene application. WTCI's request was therefore not granted "retroactively" as TeleSTAR contends. Rather, the STA was granted verbally on September 2, 1987; the confirmation letter was sent on September 21. This process does not reflect any improper behavior by either the Commission's staff or WTCI.[13]

II. CONCLUSION

19. Section 312(a) of the Communications Act, 47 U.S.C. §312(a), states that the Commission "may" revoke a station license for, *inter alia*, "false statements knowingly made" to the Commission, conditions coming to our attention that would warrant denial of an initial application, "willful or repeated failure to operate substantially as set forth in the license," or "willful or repeated violation" of the Communications Act or our Rules. 47 U.S.C. §312(a). The sole violation that we have found with respect to TeleSTAR's allegations in this case is a mistake on WTCI's application form for its Sioux Falls-Sodrac route, resulting from its incorrect interpretation of the relevant question. This mistake does not warrant the exercise of our discretion to take enforcement action.[14]

III. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that the "Petition for Revocation of FCC Operating Authority for WTCI" filed by TeleSTAR, Inc., and its principals, IS DENIED.

21. IT IS FURTHER ORDERED that the Motion to Strike, filed by Western Telecommunications, Inc., IS DENIED.

FEDERAL COMMUNICAT ONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Petitions to revoke filed by third parties are not cognizable under the Communications Act or our Rules. Therefore, consistent with our prior practice, we will treat TeleSTAR's Petition as an informal request for Commission action under Section 1.41 of our Rules, 47 C.F.R. §1.41. *See MCI Telecommunications Corp.*, 3 FCC Rcd. 509 (1988), *supplemented*, FCC 88-49, released Feb. 18, 1988, *appeal pending sub nom. TeleSTAR, Inc. v. FCC*, No. 88-1153 (D.C. Cir.); *KSDK, Inc.*, 93 FCC 2d 893 (1983).

[2] WTCI filed an Opposition to the Petition on November 19, 1987 and MCI Communications Corporation (MCI) filed Comments in Opposition on November 18, 1987. TeleSTAR filed a Reply dated January 7, 1988. In response, WTCI filed a Motion to Strike and TeleSTAR then filed a Reply to the Motion to Strike. Because TeleSTAR's Reply was filed several weeks late and raised new matters for the first time, it violates Section 1.45(a) of the Commission's Rules, 47 C.F.R. §1.45(a), and could, therefore, be properly dismissed. Although we do not condone TeleSTAR's disregard of our rules, in order to ensure fairness to TeleSTAR, we will consider TeleSTAR's Reply and the response thereto included in WTCI's Motion to Strike.

In addition, on May 25, 1988, the General Counsel, pursuant to section 308(b) of the Communications Act, requested additional information from WTCI regarding one of the issues in this proceeding. The letter stated that WTCI's response shall be received by June 14, 1988, and that any reply by TeleSTAR shall be received by June 24, 1988. It also stated that comments addressing any matters other than those set forth in the letter would not be considered, no extensions of time would be granted and no additional pleadings would be accepted. Pursuant to the General Counsel's letter, WTCI submitted a response, received on June 14, 1988, addressing the matters raised in the General Counsel's letter. TeleSTAR submitted its reply late, on June 27, 1988. Although the reply was submitted late, we will consider it, again in an effort to go out of our way to ensure fairness to TeleSTAR.

On June 9, 1988, TeleSTAR also filed an additional pleading, entitled "Objections to the General Counsel's Directive of May 25, 1988." Much of that pleading addresses matters beyond the scope of the General Counsel's letter and, pursuant to that letter, those portions will not be considered. With respect to TeleSTAR's objection to the General Counsel's request for information, that procedure was entirely appropriate. *See Bilingual Bicultural Coalition v. FCC*, 595 F. 2d 621, 630 (D.C. Cir. 1978).

[3] Section 21.3(b) of our Rules provides that "no radio license shall be issued for the operation of any station unless a permit for its construction has been granted by the Commission." 47 C.F.R. §21.3(b). In addition, it provides for waivers of the construction permit requirement and states: "No construction or modification

of a station may be commenced without a construction permit, a modified construction permit, or other authority issued by the Commission for the exact construction or modification to be undertaken, except as may be specifically provided for in other sections of this part." *Id.* In this connection, Section 21.25(a) of the Rules permits the grant of a Special Temporary Authority to construct and/or operate microwave facilities. 47 C.F.R. §21.25(a). Section 21.7 of our Rules requires that an application for new or modified microwave radio station construction permit (Form 435) be submitted and granted prior to commencement of any proposed station construction or modification, except for facility changes. 47 C.F.R. §21.7. Section 301 of the Act and Section 21.3(a) of our Rules prohibit operation of a station without the appropriate authorization from the Commission. 47 U.S.C. §301; 47 C.F.R. §21.3(a).

Last year the Commission revised Part 21 of the Rules. *See Revision of Part 21 of the Commission's Rules*, 2 FCC Rcd. 5713 (1987). In this Order, we refer to Part 21 rule sections as they existed prior to the revision, since those were the rules in effect at the time of the actions at issue in this proceeding.

[4] In addition, TeleSTAR raises several matters relating to its own applications, which were denied in CC Docket No. 85-202, *see TeleSTAR, Inc*, 2 FCC Rcd. 7352 (1987), *on reconsideration*, FCC 88- 171, released May 19, 1988, *appeal pending*, No. 88-1420 (D.C. Cir.); and its petitions to revoke MCI's authorizations. *See MCI Telecommunications Corp.*, FCC 88-183, released June 2, 1983, *reconsideration pending, appeal pending sub nom. TeleSTAR, Inc. v. FCC*, No. 88-1419 (D.C. Cir.); *MCI Telecommunications Corp.*, 3 FCC Rcd. 509 (1988), *supplemented*, FCC 88-49, released Feb. 18, 1988, *appeal pending sub nom. TeleSTAR, Inc. v. FCC*, No. 88-1153 (D.C. Cir.). These matters are unrelated to this proceeding and will not be addressed herein.

[5] MCI's Comments respond only to certain irrelevant matters raised by TeleSTAR, *see* note 4, *supra*, and therefore also need not be addressed herein.

[6] The STA involved a frequency change and therefore is not relevant to TeleSTAR's claim of unauthorized construction.

[7] The fact that WTCI's tariff stated that the customer shall provide "the necessary space for the radio and antenna equipment installed on the premises of the customer or the customer's client" is not inconsistent with Sodrac's ownership of the tower. The "space" for the equipment obviously could be space on the tower owned by the customer, here, Sodrac. In addition, we fail to see the relevance to the ownership issue of the fact that a billing statement attached to WTCI's letter covers only the tower and not related equipment. *See* TeleSTAR Reply to Letter at 2.

[8] We note that the question as to whether Sodrac had the requisite authority for tower construction is not before us. Nevertheless, because it appears that the tower supports a receive-only antenna, for which no FCC authority is required, it appears that Sodrac did not engage in any unauthorized construction.

[9] WTCI's blanket authority was originally to have expired on February 1, 1986. However, on June 7, 1983, the Commission, *inter alia*, extended the maximum term of all point-to-point microwave licenses, including WTCI's, to ten years. *See Common Carrier and Satellite Licensing Procedures*, FCC 83-276, released June 9, 1983.

[10] TeleSTAR suggests WTCI forged a temporary fixed license. *See* TeleSTAR Reply to WTCI Letter at 3; Reply at 1-2 n.3. This accusation is unsupported and therefore warrants no further inquiry.

[11] Although this decision pertained to broadcast licensees, the standards may provide guidance in the common carrier area as well. See 1 FCC Rcd at 424; *see also* A.S.D. Answer Service, Inc., 1 FCC Rcd 753 (1986) (applying the broadcast character standards in a common carrier case), on recon., FCC 88-209, released July 7, 1988, *appeal pending sub nom. Yampol v. FCC*, No. 88-1513 (D.C. Cir.).

[12] TeleSTAR also alleges that WTCI engaged in misrepresentations by failing to bring to the Commission's attention "violations" pertaining to the Coeur d'Alene network in its Opposition to TeleSTAR's petition. This argument makes no sense. The alleged violations with respect to this route were not raised by TeleSTAR until it filed its Reply to WTCI's Opposition, so WTCI could not be expected to address them until that time. Moreover, as discussed herein, TeleSTAR has not demonstrated any violations with respect to this route, so there was nothing for WTCI to engage in misrepresentation about.

[13] TeleSTAR makes various other allegations of impropriety by the Commission and its staff. These allegations are all unsupported and therefore do not warrant further inquiry.

[14] To the extent TeleSTAR's notification for use of its temporary fixed authority for three months rather than 90 days, see paras. 10-11, *supra*, were to be considered a rule violation, it also would not warrant enforcement action. Moreover, even if the standards set forth in Section 309(e) were applicable in this revocation proceeding, which it is not, see MCI Telecommunications Corp., 3 FCC Rcd at 513-14 and n.18, TeleSTAR has presented no substantial and material question of fact requiring a hearing.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-611

In the Matter of

AT&T COMMUNICATIONS — Transmittal Nos. 1063 and 1064

Revisions to Tariff F.C.C. Nos. 1, 2, 11, 13, and 14

MEMORANDUM OPINION AND ORDER

Adopted: October 25, 1988; Released: November 1, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On June 7, 1988, the Common Carrier Bureau released an Order in the above captioned proceeding concluding that billing and collection expenses projected by AT&T Communications (AT&T) warranted further investigation. *AT & T Communications*, 3 FCC Rcd 3617 (1988) (June 7 Order). AT&T filed a supplemental direct case to defend its billing and collection expenses on July 1, 1988, the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO) filed comments on July 11, 1988, and AT&T filed a rebuttal on July 18, 1988. On July 19 and 21, 1988, respectively, after the pleading cycle had closed, the People of the State of California and the Public Utilities Commission of the State of California (California) and the Northwestern Indiana Telephone Company, Inc. (Northwestern) each filed comments along with motions for acceptance of late filed pleadings. AT&T filed oppositions to these motions, and replies to each of these pleadings along with motions to accept the replies on August 3, 1988.[1]

2. On September 26, 1988, the Chief of the Tariff Division of this Bureau directed AT&T to submit data showing the 1988 MTS billing and collection program costs included in rates that became effective on January 1, 1988, the projected cost for subsequent years, and the estimated cost of billing these accounts in 1988 and subsequent years.[2] He also instructed AT&T to provide the estimated cost in 1988 of purchasing billing and collection services from the local exchange carriers (LECs) at their current rates. AT&T submitted this information on October 11, 1988, and supplemented the information on October 19, 1988.

II. SUMMARY OF SUPPLEMENTAL DIRECT CASE

3. AT&T argues that the Commission must allow it to recover prudently incurred costs. Supplemental Direct Case at 7-11. AT&T maintains that its billing and collection program is cheaper than using LEC billing and collection services. It claims savings of$550 million. *Id.* at 11. AT&T argues that this Bureau was wrong in ascribing a$398 million cost increase to the billing and collection program. It asserts that 60 percent of that cost is not attributable to this program, and that of the remaining 162 million, only a portion is related to this program. *Id.* at 12. AT&T also says it plans to extend the phase-in of this program, thereby significantly reducing the costs associated with 1988. *Id.* at 13-14. Finally, AT&T contends that we erred in comparing the cost of its new program to LEC billing and collection rates in 1988. AT&T maintains that the costs of the AT&T program should be compared to the rates LECs would have charged if AT&T had not threatened to develop its own billing and collection system. Under this assumption, AT&T, using the billing and collection rates filed by the LECs in 1984, claims that its billing and collection program results in a savings of$553 million. *Id.* at 15-17. AT&T alleges that its decision to perform account inquiry functions and WATS and 800 Service billing formerly provided by the LECs has already produced savings of$97 million. *Id.* at 19.

4. AT&T also states that additional benefits will flow from implementation of its new MTS program. *Id.* at 19-23. Further, it claims that generally accepted accounting principles require current expensing of the program cost. *Id.* at 26-31. Moreover, AT&T argues that the competitive environment requires current expensing, because competition will restrain the company from collecting more than its then current expenses in the future. *Id.* at 31-35.

III. SUMMARY OF OPPOSITIONS AND REPLIES

5. OPASTCO states that its members have always offered high quality billing and collection service at low prices. OPASTCO Comments at 1-2. It also contends that there are at least two other major competitors in the provision of billing and collection services who cause LEC billing and collection rates to remain low. *Id.* at 2-3. California states that it has examined the accounting and prudency aspects of the billing and collection question, and has deferred some of AT&T's current costs to future periods. California Comments at 2. California has also issued an Order Instituting Investigation to explore the revenue impact that this program will have on the LECs, the impact for end users, and the impact on AT&T. California suggests that the Commission issue a similar Order. *Id.* Northwestern maintains that it would be unfair to allow AT&T to assume billing and collection for the larger accounts, while requiring LECs to continue the billing for smaller accounts. Northwestern Comments at 10-11. Northwestern alleges that the AT&T billing and collection program violates the Commission's policy favoring single billing. *Id.* at 11-13. Northwestern asserts that, in any case, AT&T's billing and collection capability will be unnecessary when open network architecture (ONA) and integrated switched digital network (ISDN) are implemented. *Id.* at 13-15. Northwestern attacks AT&T's analysis of the cost of the billing and collection program. Northwestern claims that certain costs, namely "Commercial and Marketing Expenses" and "Other General Expenses", have been hidden in expense categories not admitted by AT&T. *Id.* at 5-6. Northwestern also argues that the slowed implementation of AT&T's MTS billing program will not offset any of the costs of this

program. *Id.* at 7-10. Finally, Northwestern says that other competitive billing and collection services keep LEC rates down *Id.* at 9.

6. AT&T in its rebuttal and replies contends that LEC billing and collection services are not adequate for optional calling plans and do not provide adequate data for planning and other purposes. It disputes OPASTCO's and Northwestern's claims that the existence of alternative providers of billing and collection services serve to reduce LEC billing and collection rates. AT&T maintains that the two companies mentioned by OPASTCO are merely agents for LECs. AT&T repeats its claim that its system is more efficient and less costly than alternative systems. Rebuttal of AT&T at 1-4; AT&T Reply to Northwestern at 4-5. AT&T also alleges that the Commission has a more complete record before it than does California, and that there is therefore no reason to proceed in the manner that California has chosen. AT&T Reply to California at 1-3.

7. AT&T reiterates that its billing and collection program costs are prudently incurred and must be treated as current expenses. *Id.* It asserts that because billing and collection are detariffed, the LECs are free to refuse to bill only the small accounts if they so desire. AT&T Reply to Northwestern at 6. AT&T further claims that Northwestern has incorrectly characterized the Commission's preference for single access bills; it argues that the meet point billing arrangement cited by Northwestern is wholly irrelevant. *Id.* AT&T maintains that the implementation of ONA and ISDN will have no bearing on its need for its own billing system; rather, ONA and ISDN will provide additional technical capabilities for the provision of services regardless of how they are billed. *Id.* at 7. AT&T also contends that all the costs of this program have been accounted for in the supplemental direct case. *Id.* at 3-4.

IV. SUMMARY OF AT&T SUPPLEMENTAL LETTERS

8. The AT&T October 11 Letter again objects to any comparison of AT&T billing program expense with 1988 LEC rates. It reiterates that the LECs' 1984 billing rates reflect what the LECs would be charging AT&T for billing and collection in the absence of AT&T's own billing and collection capability. October 11 Letter at 2. Moreover, AT&T claims that its MTS billing system costs should not be compared to LEC billing and collection rates because of the qualitative differences between the AT&T and LEC billing systems. *Id.* at 3. AT&T disputes several of the premises of the Tariff Division's September 26 letter, but responds with data fulfilling that additional request. In particular, AT&T provides the expense that it would have incurred at 1988 LEC rates if LECs performed all MTS billing for AT&T. AT&T states that in the November 17, 1987, filing it had projected a takeover of 18.437 million MTS accounts in 1988, at an additional cost of279 million. October 11 Letter at Appendix, Chart II; October 19 Letter at Attachment, p. 1. AT&T, however, has revised this estimate to73 million because of the deferred implementation of the program. October 19 Letter at Attachment, p. 1.

V. DISCUSSION

9. The *June 7 Order* noted that the cost of the AT&T MTS billing program represented a major increase in spending. We observed that while this program might result in a benefit to the public over the long run, the cost so far exceeded the cost of other available alternatives that it might be unreasonable to allow expenses of this magnitude. AT&T should be required to demonstrate a clear ratepayer benefit to justify including the difference between projected expenses for this program and the billing and collection fees AT&T would have paid to local exchange carriers as an allowable expense. [3] This Bureau ordered AT&T to file additional data to identify and explain the full costs and schedule of its MTS billing program, and to justify both the level of these expenses and the allocation of MTS billing expenses to the 1988 revenue requirement.[4]

10. We are not persuaded by AT&T's claim that the current LEC billing and collection rates do not represent the expenses that AT&T would have incurred in 1988 if AT&T had not chosen to implement its own MTS billing program. The assumption that LECs would have continued to charge the 1984 billing and collection rates in the absence of an AT&T billing program appears to be inconsistent with the Commission's prior findings in the proceeding to determine whether LEC billing and collection services should be deregulated.[5] The Commission found that the billing and collection service is inherently competitive and that such services can be provided by a variety of sources.[6] No evidence has been presented in this proceeding which would cast doubt upon the Commission's prior findings. If the 1984 LEC rates were relatively high, those rates presumably reflected temporary market conditions that were an accidental byproduct of the AT&T divestiture. Neither AT&T nor any third source of billing services had the capacity to replace LEC billing capabilities on divestiture day, but AT&T and others were capable of developing that capacity. One could reasonably expect that LECs would adjust rates to reflect competitive realities. In these circumstances, we find that the current LEC rates do reflect the expense AT&T would have incurred if it had not chosen to do its own MTS billing.

11. This does not mean that AT&T is foreclosed from doing its own billing. We did not initiate this investigation to determine whether AT&T should be ordered to abandon its MTS billing program. We presume that the AT&T management had valid and rational reasons for concluding that performing MTS billing within the company would serve the long term interests of AT&T shareholders. We initiated this investigation to determine whether that decision will produce any benefit for current ratepayers that would justify including the difference between the amounts AT&T will spend for MTS billing and the amounts AT&T would have paid the LECs in the revenue requirement computation. We have given AT&T repeated opportunities to demonstrate that such a benefit exists. It has failed to do so.

12. According to AT&T, its MTS billing program would facilitate the introduction of new services and the acquisition of customer data. October 11 Letter at 3. These speculative benefits do not furnish sufficient justification for the inclusion of the higher costs of implementing AT&T's own billing and collection program as allowable expenses. Current ratepayers should bear only the legitimate costs of providing service to them. *Tennessee Gas Pipeline v. Federal Energy Reg. Comm'n*, 606 F.2d 1094, 1109 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 920 (1980); *Amendment of Part 65*, 1 FCC Rcd 952, 955 (1986). AT&T has given us no reason to believe that MTS service users will benefit by receiving the bill for their AT&T service from AT&T instead of from a LEC. The Bureau

notes that AT&T itself has decided to delay implementation of this program. AT&T does not say that this delay will be detrimental the MTS users.

13. AT&T alleges that its expenditures enjoy a presumption of reasonableness, which precludes the Commission from substituting its own judgment for that of the corporate officers of the regulated company. Supplemental Direct Case at 8. As AT&T admits, however, this presumption is qualified. The Supreme Court has emphasized that although good faith is to be presumed on the part of the managers of a business, a court may substitute its judgment for theirs where there is inefficiency or improvidence.[7] The Commission has interpreted these cases and the Communications Act to mean that while good faith is presumed, it may find challenged expense to be exorbitant, unnecessary, wasteful, or extravagant. The carrier has the burden of establishing the reasonableness of its operating expenses and must support inclusion of any challenged expenditure.[8] The Commission reiterated this position recently, saying that the carrier has the burden of proof regarding disallowances.[9]

14. Even if AT&T initially enjoyed a presumption of reasonableness in regard to these expenses, the Bureau has given AT&T ample notice of our concerns regarding the billing and collection program, and more than ample opportunities to defend these expenses. The Bureau did not disallow any of AT&T's MTS billing and collection costs at the outset, even though the November 17 filing provided inadequate explanation and justification. In *AT & T Communications*, 3 FCC Rcd 263 (1987), the Bureau gave AT&T a second opportunity to justify its rates. After AT&T again failed to do so, the Bureau made preliminary findings that the costs associated with the MTS billing and collection program appear to be exorbitant and unnecessary in light of the availability of a less costly alternative billing and collection arrangement. The Bureau gave AT&T a third opportunity to justify this program. *AT & T Communications*, 3 FCC Rcd 3617 (1988). Finally, AT&T received a fourth opportunity to justify these expenses pursuant to the September 26 letter. AT&T has not carried its burden of demonstrating that these costs are reasonable.

15. Our determination that a portion of the billing and collection expense should be disallowed does not automatically determine the consequences of the disallowance. If AT&T had targeted its 1988 rates to earn its authorized rate of return and we had no reason to believe that any of the cost or revenue projections are erroneous, we would conclude that the current rates are unjust and unreasonable and would order AT&T to reduce its rates to reflect the disallowance. AT&T did not target its 1988 rates to earn the authorized return, however, and it has revised its 1988 cost and revenue projections several times. If we used the data submitted with the November 1987 tariff filing, the data submitted in the January 1988 direct case, data derived from annualizing the reported actual results for the first six months of 1988, or data derived from adjusting those annualized results to reflect currently anticipated changes in costs and revenues, we would find a shortfall in the switched service category revenues that would be required to produce a 12.2 percent return. In each case the shortfall exceeds the difference between the currently projected MTS billing expense and the expense that would be projected if AT&T had used LEC billing services for MTS billing. Accordingly, we conclude that no adjustment is required in the current AT&T switched service rates to reflect our disallowance decision.

16. We do, however, require AT&T to adjust 1988 earnings reports to reflect our decision to disallow the difference between the amounts AT&T spent for MTS billing and the amounts AT&T would have paid the LECs. This disallowance must, of course, be attributed to the switched service category.

17. We also require AT&T to reflect our decision to disallow in any future revenue requirement computations and any future earnings reports. If the LECs offer MTS billing in a future period and the cost of AT&T billing exceeds the current cost of LEC billing, the projected or past AT&T MTS billing expense must be adjusted to reflect our disallowance of the difference between the amounts AT&T will spend or has spent and the amounts AT&T would have paid the LECs. An adjustment will not be required if the LEC charges would exceed the cost of the AT&T billing program or the LECs cease to offer a billing service that can be compared to the cost of the AT&T billing program.

18. The amount of this excess in 1988 has been characterized differently by AT&T at every stage of this proceeding. As shown AT&T's October 19 Letter, AT&T's November 17, 1987, filing included 279 million in increased costs due to the MTS billing and collection program. However, the October 19 Letter also demonstrates that AT&T has revised the program and currently estimates that only73 million will be spent in excess of the cost of obtaining LEC billing and collection services.[10] Because AT&T is only actually spending73 million on this program, only this level of cost is actually being passed on to the ratepayers, so only this level is actually available for disallowance with respect to the 1988 rate period. Therefore, the Bureau hereby disallows the73 million expense associated with AT&T's billing and collection program that is in excess of the costs of LEC billing and collection services.

19. Therefore, IT IS ORDERED, pursuant to Sections 201(b) and 204 of the Communications Act, 47 U.S.C. §§ 201(b), 204, that the cost of AT&T Communications' MTS billing and collection program that is in excess of the costs that would have been incurred if AT&T had continued to use local exchange carrier billing and collection services for AT&T MTS IS DISALLOWED.

20. IT IS FURTHER ORDERED, that the motion to accept late-filed comments filed by the State of California and the Public Utilities Commission of the State of California, the motion for leave to file comments out of time filed by Northwestern Indiana Telephone Company, Inc., and the motions to accept reply filed by AT&T Communications ARE GRANTED.

21. IT IS FURTHER ORDERED that the Investigation in CC Docket No. 87-611 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] We grant the motions for acceptance of late filed comments and replies.

[2] Letter from Chief, Tariff Division, to W.E. Lind, AT&T, Sept. 26, 1988, at 2.

[3] *June 7 Order*, 3 FCC Rcd at 3619.

[4] *Id.*

[5] *Detariffing of Billing and Collection Services*, 102 FCC 2d 1150 (1986).

[6] Id. at 1169-1171.

[7] *See, e.g.*, West Ohio Gas Co. v. Ohio P.U.C., 294 U.S. 63, 72 (1935).

[8] Policy to be Followed in the Allowance of Litigation Expenses of Common Carriers in Ratemaking Proceedings, 92 FCC 2d 140, 144-45 (1982).

[9] AT&T -- Accounting Instructions for the Judgment and Other Costs Associated with the Litton Systems Antitrust Lawsuit, 3 FCC Rcd 500, 505 n.38 (1988).

[10] October 19 Letter, Attachment, p. 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LEHIGH VALLEY
TELCOM, INC.,
Complainant,

v. File No. E-87-150

THE BELL TELEPHONE COMPANY OF
PENNSYLVANIA,
Defendant.

ORDER

Adopted: October 25, 1988; Released: November 1, 1988

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On August 31, 1987, Lehigh Valley Telcom, Inc. (Lehigh) filed the above-referenced complaint directed against the Bell Telephone Company of Pennsylvania (Bell) pursuant to Section 208 of the Communications Act, 47 U.S.C. § 208. Lehigh resells interstate and intrastate service in Pennsylvania. It alleged that Bell demanded that Lehigh subscribe to separate hunt groups for intrastate and interstate access in order to pay business line rates for originating intrastate traffic and that this violated Sections 201 and 202(a) of the Communications Act, 47 U.S.C. § 201, 202(a). Bell filed its answer on October 20, 1987, stating, *inter alia*, that Lehigh can use common Feature Group A access facilities for both interstate and intrastate traffic.

2. After the pleading cycle ended, the parties entered into negotiations aimed at settling the matters in controversy. By joint motion filed October 12, 1988, the parties advised the Commission that they have reached a mutually satisfactory settlement and requested that the complaint be dismissed with prejudice. On the basis of the statements contained therein, we conclude that the proceeding should be terminated.

3. According, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned proceeding IS GRANTED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 26, 1988

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELLSOUTH'S PETITION FOR WAIVER OF CEI REQUIREMENTS TO CONDUCT TECHNICAL TRIALS OF PUBLIC TELEPHONE COIN MESSAGING SERVICE

On October 7, 1988, the Bell South Operating Companies, South Central Telephone Company and Southern Telephone and Telegraph Company (BellSouth), filed a petition requesting a waiver of the Commission's Comparably Efficient Interconnection (CEI) requirements. BellSouth seeks permission to conduct technical trials to evaluate new technologies that could be used to provide a messaging service for coin telephone companies. According to BellSouth, the service will allow coin telephone customers, who have placed a call and receive a busy signal or no answer, to record a message that will be forwarded at a later time. BellSouth states that the trials would be limited to six months and would involve no more than 300 coin stations in each of three local access and transport area (LATAs).

BellSouth specifies that it is not seeking Commission approval of any future deployment of coin messaging beyond these three limited technical trials. BellSouth also states that its waiver request is similar in all aspects to the Bell Atlantic waiver request for public telephone coin messaging service that was recently approved by the Commission.

Interested parties should file comments on this petition by **November 10, 1988,** and reply comments by **November 18, 1988,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of BellSouth's petition can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-483

In re Applications of

KENNEBUNKPORT FM LIMITED PARTNERSHIP (hereafter Limited)	File No. BPH-871105MF
CHESTER P. COLEMAN (hereafter Coleman)	File No. BPH-871105MG
RADIO KENNEBUNKPORT, INC. (hereafter RKI)	File No. BPH-871105MK
LINDSAY COLLINS AND STUART RICHTER, A GENERAL PARTNERSHIP (hereafter Collins)	File No. BPH-871105ML
KENNEBUNKPORT MEDIA, LIMITED PARTNERSHIP (hereafter Media)	File No. BPH-871105MQ
MAINE STREET BROADCASTING, INC. (hereafter Street)	File No. BPH-871105MO (DISMISSED HEREIN)

For Construction Permit for a
New FM station on Channel 284A (104. 7 MHz) at
Kennebunkport, Maine

HEARING DESIGNATION ORDER

Adopted: September 30, 1988 Released: November 3, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters*. Engineering study has revealed that the transmitter site proposed in Street's application, as originally filed and as amended on September 9, 1988, is 2.1 km short-spaced to the licensed transmitter location of first adjacent channel station WLKZ(FM), Wolfeboro, New Hampshire, in violation of the Commission's minimum distance separation rule, 47 C.F.R. § 73.207(a). Street has not addressed this deficiency and has not requested a waiver of the § 73.207(a).

3. In its *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936 (May 13, 1985), the Commission adopted new "hard look" procedures for the processing of FM broadcast applications. However, the *Report and Order* made no substantive change in existing policy governing the acceptability of applications as defined in 47 C.F.R. § 73.3566(a) which states, in pertinent part, that applications "patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will not be accepted for filing." Furthermore, a waiver of our minimum distance separation rule does not appear to be warranted here where the other Kennebunkport applicants have proposed fully spaced sites. *See, e. g., Donovan Burke*, 60 RR 2d 110 (1986). Accordingly, Street's application, as amended, will be returned as unacceptable for filing.[1]

4. *RKI*. In response to Section VI, FCC Form 301, RKI indicates that it will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), it is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rule as set forth in FCC Form 396A, the five-point Model EEO Program. However, the EEO program submitted by RKI is deficient for failure to identify specific sources of recruitment specializing in female candidates. Accordingly, RKI will be required to file an amendment to its EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.[2]

5. *Collins*. In Exhibit 1 to its application as amended, Collins reports that its general partners, Lindsay Collins and Stuart Richter, are employed as general manager and sales manager, respectively, by Empire Radio Partners, Ltd., licensee of WJYY(FM), Concord, New Hampshire, and that they will terminate their positions should Collins' instant application be granted. A condition reflecting this commitment will be specified below.

6. Section II, Item 4(a), FCC Form 301 (October 1986) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. The Collins application contains no numbers and street addresses for its two principals, Lindsay M. Collins and Stuart F. Richter. Accordingly, Collins must submit an amendment which gives all the information required by Section II, Item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

7. Collins petitioned for leave to amend its application on July 7, 1988. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendment will be accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

8. *Other matters*. The Federal Aviation Administration (FAA) has determined that the towers proposed by Coleman and RKI constitute hazards to air navigation. Accordingly, an issue with respect thereto will be included and the FAA will be made a party to the proceeding.

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Coleman and RKI would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That the application of Maine Street Broadcasting, Inc., as amended, IS HEREBY RETURNED as unacceptable for filing.

13. IT IS FURTHER ORDERED, That in accordance with paragraph 4 hereinabove, RKI shall submit to the presiding Administrative Law Judge an amendment to its Equal Employment Opportunity Program within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That in the event of a grant of Collins' application, the construction permit will be conditioned as follows:

Prior to the commencement of program test authority, permittee shall certify to the Commission that Lindsay Collins and Stuart Richter have terminated their employment with Empire Radio Partners, Ltd., licensee of WJYY(FM), Concord, New Hampshire.P

15. IT IS FURTHER ORDERED, That Collins shall submit an amendment which contains the information required by Section II, Item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

16. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Collins IS GRANTED and the corresponding amendment is ACCEPTED to the extent indicated in paragraph 6 hereinabove.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] In order to better utilize the Bureau's limited processing staff resources, the Commission has approved staff consideration and disposition of tenderability and acceptability matters in the context of the relevant hearing designation order rather than in a separate action document. *See Teton Broadcasting Limited Partnership*, 1 FCC Rcd 518 (1986).

[2] In the event that an applicant listed an organization in its EEO program as a recruitment source which is unfamiliar to the staff but which would satisfy our EEO requirements, the applicant may amend its EEO program to describe that organization.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-485

In re Applications of

ABILENE RADIO PARTNERSHIP (hereafter: Radio)	File No. BPH-871124MF
WILLIAM E. CORDELL D/B/A SPECTRUM ENGINEERING COMPANY (hereafter: Spectrum)	File No. BPH-871124MH
CVC BROADCASTING CORP. (hereafter: CVC)	File No. BPH-871124MJ
ROBERT LESTER GRIFFIS (hereafter: Griffis)	File No. BPH-871124MO

For Construction Permit for a
New FM Station on Channel 223C in
Abilene, Texas

HEARING DESIGNATION ORDER

Adopted: September 30, 1988; Released: November 3, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Radio*. Radio proposes to use the existing tower of station KAGN(FM), Abilene, Texas. Radio lists the tower height above ground level (AGL) as being 145 meters. However, Commission records show the tower height (AGL) to be 139.9 meters. Because Radio proposes to mount its antenna on an existing tower of another Commission permittee, and because specific reference is made to this tower in various places in Radio's application, the Commission can, "drawing on the application as a whole," confidently verify the correct tower height of 139.9 meters by taking official notice of the tower height as found in the Commission's files for the collocated facility. Accordingly, Radio's application was found to be acceptable for filing; however, Radio will be required to file a corrective amendment to its application with the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *Griffis*. Griffis proposes to locate his antenna on the existing tower of station KGNZ(FM), Abilene, Texas. Griffis lists the coordinates of this tower as 32' 17' 46" NL, 99' 43' *10* " WL, and the tower height above ground level (AGL) as 400 feet (122 meters). However, Commission records show the tower as being located at 32' 17' 46" NL, 99' 43' *01* " WL, with a tower height (AGL) of 123 meters (including obstruction lighting). Because Griffis clearly proposes to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in Griffis' application, the Commission can, "drawing on the application as a whole," confidently verify the coordinates and tower height by taking official notice of the correct values as found in the Commission's files for the licensed collocated facility. Accordingly, Griffis' application was found to be acceptable for filing; however, Griffis will be required to file a corrective amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

4. *EEO*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although CVC has filed such statement, it is deficient. CVC has not listed a specific hispanic-oriented organization for recruitment purposes even though U.S. Labor Department statistics list Abilene in an area with a workforce that is 10% hispanic. Accordingly, CVC will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. *Divestiture*. William E. Cordell is technical director of KTRH(AM) and KLOL(FM), Houston, Texas; KWES(FM), Monohans, Texas; and KSMG(FM), Seguin, Texas. Cordell has indicated his intent to terminate his relationship with these stations in the event of grant of the referenced application. Accordingly, in the event of grant of Spectrum's application, Cordell will be required to sever all connections with these stations prior to the commencement of program test authority.

6. *City Coverage*. Spectrum and CVC do not provide a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. Spectrum has requested a waiver of Section 73.315 and CVC has requested a waiver if deemed necessary by the staff. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). Spectrum's and CVC's 3.16 mV/m contours are in substantial compliance with this requirement: Spectrum's contour covers approximately 97.5% of the community of license (99% of its population) and CVC's approximately 92% of the community of license (97% of its population). Accordingly, no waiver is required and the waiver requests of Spectrum and CVC will be dismissed as moot.

7. *Late - filed Amendments*. Spectrum and CVC petitioned for leave to amend their applications on the dates specified below. The accompanying amendments were filed after February 16, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Com-

mission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Spectrum	April 28, 1988
CVC	April 20, 1988

8. *Air Hazard.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and applicants Radio and Griffis have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Radio and Griffis would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the Radio and Griffis would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Radio shall submit a corrective amendment with respect to tower height to the presiding Administrative Law Judge.

12. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Griffis shall submit a corrective amendment with respect to tower coordinates and tower height to the presiding Administrative Law Judge.

13. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, CVC shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

14. IT IS FURTHER ORDERED, That, in the event of grant of Spectrum's application, William E. Cordell will be ordered to divest himself of all interests in and sever all connections with stations KTRH(AM), KLOL(FM), KWES(FM) and KSMG(FM) prior to the commencement of program test authority.

15. IT IS FURTHER ORDERED, That the waiver requests filed by Spectrum and CVC ARE DISMISSED as moot.

16. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Spectrum and CVC ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-516

In re Applications of

ROLLINGS COMMUNICATIONS, INC. (hereafter Rollings)	File No. BPH-880107ML
KASPAR BROADCASTING COMPANY OF MISSOURI (hereafter Kaspar)	File No. BPH-880107MO
JAMES C. MAGEE	File No. BPH-880107MP

For Construction Permit for a
New FM Station in Warrenton, Missouri
Channel No. 260A (99.9 MHz)

HEARING DESIGNATION ORDER

Adopted: October 14, 1988 Released: November 3, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. In response to Section VI, FCC Form 301, the applicants below have indicated that they will employ five or more full-time employees. Pursuant to C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO programs submitted by the following applicants are incomplete or are otherwise deficient in the manner described below. Accordingly, each applicant listed below will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANTS	DEFICIENCY
Rollings, Kaspar	Failed to identify recruitment procedures (both orally and in writing) to be utilized to encourage the referral of qualified female applicants.

3. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Rollings petitioned for leave to amend its application on May 17, 1988 and July 25, 1988. The accompanying amendments were filed after March 21, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, and in accordance with paragraph 2 hereinabove, Kaspar and Rollings shall submit Section VI information in accordance with the requirements of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Rollings ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-517

In re Applications of

POCAHONTAS BROADCASTING COMPANY (hereafter PBC) File No. BPH-871229MJ

MCDOWELL COUNTY BROADCASTING (hereafter MCB) File No. BPH-880106ME

For Construction Permit for a
New FM Station on Channel 275A (102.9 MHz)
Welch, West Virginia

HEARING DESIGNATION ORDER

Adopted: October 19, 1988; Released: November 3, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. PBC and MCB have not completed Item 4 correctly. PBC's application gives a post office box number as the address for the applicant. MCB's application did not list the applicant, its address and the other required information. Additionally, MCB gave post office box numbers as the home addresses for all of its principals. Accordingly, PBC and MCB must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *PBC*. An engineering study indicates that the operation of PBC's proposal may exceed the radiofrequency (RF) guidelines under 47 C.F.R. § 1.1307(b). Accordingly, PBC will be required to amend its application within 30 days of the date of this Order to demonstrate compliance with the RF radiation guidelines. The applicant must submit a detailed study based upon OST Bulletin No. 65, October 1985 entitled "Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Radiation." Note also that all calculations must be made two meters above the ground. This study must include the cumulative effect of the proposed operation and any co-located or nearby RF sources. If a fence is to be built, the applicant must give the distance from the base of the tower to the fence. Since the proposal of the applicant may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the applicant is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, the applicant will be required to file, within 30 days of the release of this Order, an environmental assessment (EA) with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to began before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 429 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to PBC in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if either.

6. IT IS FURTHER ORDERED, That PBC and MCB shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

7. IT IS FURTHER ORDERED, That in accordance with paragraph hereinabove, PBC shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the

time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-77

In the Matter of

Amendment of Section 73.202(b), RM-5900
Table of Allotments,
FM Broadcast Stations.
(Key West, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 23, 1988; Released: November 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Key Chain, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 1053 (1988), proposing the substitution of Channel 228C2 for Channel 228A at Key West, Florida, and the modification of its license for Station WKRY(FM) to specify operation on the higher powered channel. Petitioner filed comments and reply comments supporting the proposal and reiterating its intention to apply for Channel 228C2, if allotted to Key West. Florida Keys Broadcasting Corporation (Florida Keys), licensee of Stations WKIZ(AM) and WEOW(FM), Key West, filed opposing comments.

2. Florida Keys opposes the upgrading of Station WKRY(FM), contending that the upgrading of the station, as proposed in the *Notice*, would have an adverse technical impact on Station WEOW(FM)'s operation. It states that Station WEOW(FM) occasionally receives blanketing interference complaints from listeners, especially those with older receivers. Florida Keys contends that this situation will be aggravated if the petitioner is permitted to upgrade its operation to 50,000 watts at its present location, claiming that more than half of the population of Key West will live within the blanket interference contour. It is also concerned that the proposed power increase for Station WKRY(FM) to 50,000 watts could result in a significant RF radiation hazard. It states that Station WKRY's antenna is presently situated atop a motel where guests and employees spend extended periods of time close to the antenna. It doubts that petitioner can mitigate the "likely" RF radiation hazard due to the local height limitation ordinances which would prevent Station WKRY from sufficiently increasing its antenna height. Finally, it contends that the allotment of Channel 228C2 would constitute an inefficient use of the spectrum, stating that Station WKRY(FM), operating with maximum Class A facilities, could achieve coverage comparable to that which it would have using 50,000 watts of power and the very low antenna height required by Key West's zoning ordinances.

3. Petitoner states that Florida Keys' arguments are flawed and thus its opposing comments should be dismissed. It contends that the concerns of Florida Keys are based on a number of unwarranted and premature assumptions. First, it states that the specification of Station WKRY's present transmitter site in the petition was only as a convenient reference point to demonstrate that a fully-spaced area exists close enough to the community of license to provide the required city-grade coverage and not a commitment to specify those coordinates in any future application. It goes on to state that no more is required at the rule making stage unless there is "grave" doubt that the proposed allotment is viable, citing *Pinckneyville, Illinois*, 30 R.R. 2d 1344 (1974), allotment rescinded, 41 R.R. 2d 69 (1977), and *Sun Valley, Idaho*, 37 R.R. 2d 843 (1976). Petitioner also points out that its original petition for rule making and engineering exhibit demonstrated that there is an ample fully spaced area, even exclusive of Key West proper, where an upgraded Class C2 facility could be located. Thus, petitioner argues that any transmitter site concerns should be addressed only at the application stage. Likewise, petitioner recognizes and accepts its responsibilities as set forth in Section 73.318 of the Commission's Rules with respect to any blanketing interference which may arise. However, like the transmitter site issue, petitioner asserts that this also is irrelevant to the rule making, citing *Clinton and Conway, Arkansas*, 49 R.R. 2d 926 (1981), *Augusta, Maine*, 40 R.R. 2d 1476 (1977) and *Canton, New Jersey*, 11 R.R. 2d 1676 (1067). In conclusion, it states that the upgrading of Class A stations in the Florida Keys serves the public interest in that the expanded service provides the residents of a relatively isolated area, as well as the commercial and recreational boaters, with a diversity of broadcasting information, especially as concerns essential weather warnings and news.

4. We believe that the public interest would be served by substituting Channel 228C2 for Channel 228A at Key West since it could enable Station WKRY to expand its coverage area. Absent a sufficiently compelling showing demonstrating that no sites complying with the Commission's minimum distance separation and other technical requirements exist, the Commission's concerns at the rule making stage do not generally require detailed showings concerning the availability and suitability of a specific transmitter site. Rather, we require a showing demonstrating only that such an area does exist. Florida Keys does not contend that the allotment would violate either the minimum distance separation or city-grade coverage requirements. Rather, it expresses concern over the possibility of blanketing interference and RF radiation hazards if Station WKRY upgrades at its present location. Therefore, in accordance with past practice, we find that these issues are more properly addressed at the application stage. *See Kirksville, Missouri*, 3 FCC Rcd 3629 (1988).

5. Based on the above discussion, we will substitute Channel 228C2 for Channel 228A at Key West, Florida, and modify petitioner's license for Station WKRY(FM) accordingly. Channel 228C2 can be allotted to Key West in compliance with the Commission's minimum distance separation requirements and can be used at Station WKRY's present transmitter site.[1] Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective

December 19, 1988, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Key West, Florida	223C1, 228C2, 254C, 258C, 296A, 300C1

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Key Chain, Inc. for Station WKRY(FM), Key West, Florida, IS MODIFIED effective **December 19, 1988,** to specify operation on Channel 228C2 in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 24-34-18 and West Longitude 81-45-19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-39

In the Matter of

Amendment of Section 73.202(b), RM-6151
Table of Allotments,
FM Broadcast Stations.
(Okmulgee and Stillwater, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 11, 1988; Released: November 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the joint request of Brewer Communications, Inc., licensee of Station KOKL-FM, Channel 232A, Okmulgee, Oklahoma, and Stillwater Publishing Company, Inc., licensee of Station KSPI-FM, Channel 230C, Stillwater, Oklahoma (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 894 (1988). The *Notice* proposed the substitution of Channel 231C2 for Channel 232A at Okmulgee and the modification of Station KOKL-FM's license to specify the higher powered channel, and the substitution of Channel 229C2 for Channel 230C at Stillwater and the modification of Station KSPI-FM's construction permit to specify the lower powered channel. Petitioners filed comments supporting the substitution of channels at Okmulgee and Stillwater and reiterated their intention to apply for the new channels, if allotted. No other comments were received.

2. We believe the public interest would be served by adopting the channel changes as proposed because it could permit Station KOKL-FM at Okmulgee to expand its coverage area, and because Stillwater Publishing has agreed to the modification of its license for Station KSPI-FM to specify Channel 229C2 in lieu of its present Channel 230C. Channel 231C2 can be allotted to Okmulgee in compliance with the Commission's minimum distance separation requirements with a site restriction of 27.5 kilometers (17.1 miles northwest) to accommodate its desired transmitter site. Channel 229C2 can be allotted to Stillwater in compliance with the the Commission's minimum distance separation requirements and can be used at the site specified in Station KSPI-FM's outstanding construction permit (BPH-870225MI).[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 19, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Okmulgee, Oklahoma	231C2
Stillwater, Oklahoma	229C2, 288A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the licenses of Brewer Communications, Inc., Station KOKL-FM, Channel 232A, Okmulgee, Oklahoma, and Stillwater Publishing Company, Inc., Station KSPI-FM, Channel 230C, Stillwater, Oklahoma, ARE MODIFIED, effective **December 19, 1988,** to specify operation on Channels 231C2 and 229C2, respectively, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensees shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Station KSPI-FM, Stillwater, are North Latitude 36-06-33 and West Longitude 97-11-43. The coordinates for Station KOKL-FM, Okmulgee, are North Latitude 35-50-02 and West Longitude 96-07-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-125

In the Matter of

Amendment of Section 73.202(b), RM-6140
Table of Allotments,
FM Broadcast Stations.
(Kailua-Kona, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: November 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. In response to a petition filed by Fakas Broadcasting (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 1938 (1988), proposing the substitution of FM Channel 230C1 for Channel 228A at Kailua-Kona, Hawaii. Petitioner also requests modification of its construction permit for KLUA(FM) to specify operation on Channel 230C1. Petitioner filed supporting comments reaffirming its interest in the proposal, if allotted. Island Communications Corp. (Island),[1] licensee of Station KMAI(FM), Channel 230C1, Honolulu, Hawaii, filed opposing comments.

2. Island in its comments states that Station KMAI(FM) Honolulu presently operates on Channel 230C1. While, both KLUA and KMAI could operate on Channel 230C1 consistent with the Commission's mileage separation requirements, Island alleges that granting petitioner use of Channel 230C1 would cause objectionable co-channel interference. Therefore, Island has proposed the substitution of Channel 229C1 in lieu of 230C1 for Channel 228A at Kailua-Kona. Petitioner filed comments accepting Islands proposal for allotment of Channel 229C1, and reaffirmed his intention to apply for Channel 229C1 if allotted to Kailua-Kona.

3. We believe the public interest would be served by the substitution of Channel 229C1 for Channel 228A at Kailua-Kona, Hawaii, since it could provide the community with its first wide coverage FM service. The substitution can be made to Kailua-Kona in compliance with the minimum distance separation requirements of the Commission's Rules[2] at Station KLUA's present transmitter location. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the construction permit of Station KLUA(FM) to specify operation on Channel 229C1.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 19, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Kailua-Kona, Hawaii	229C1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Fakas Broadcasting KLUA(FM), kailua-Kona, Hawaii IS MODIFIED, to specify operation on Channel 229C1 in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Island addressed its filing as a counterproposal, it is being considered as comments.

[2] Coordinates for Channel 229C1 at Kailua-Kona are 19-43-15 and 155-55-16.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-220

In the Matter of

Amendment of Section 73.202(b), RM-6220
Table of Allotments,
FM Broadcast Stations.
(Hilo, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: November 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Irving A. Uram (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 3113 (1988), proposing the substitution of Channel 224C1 for Channel 224A at Hilo, Hawaii, and the modification of his construction permit (BPH841228MH) to specify operation on Channel 224C1. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 224C1 to Hilo, Hawaii, since it could provide that community with an opportunity for its fifth wide coverage area station. Channel 224C1 can be allotted to Hilo in compliance with the minimum distance separation requirements of Section 73.207(b) of the Rules. As proposed, we shall also modify petitioner's construction permit (BPH841228MH) to specify operation on Channel 224C1 at his present transmitter site.[1]

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 19, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Hilo, Hawaii	224C1, 234C1, 246C2, 250C2, 262C1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KHHI-FM, Hilo Hawaii IS MODIFIED, effective **December 19, 1988,** to specify operation on Channel 224C1 in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (BPH841228MH) specifying the new channel;

(b)Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are 19-43-51 and 155-04-11.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-401

In the Matter of

Amendment of Section 73.202(b),	RM-5876
Table of Allotments,	
FM Broadcast Stations.	
(Dickson, Tennessee)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 11, 1988; Released: November 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Edmisson and Eubank Communications (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 5998 (1987), proposing the allotment of Channel 229A to Dickson, Tennessee, as that community's second local FM service. Petitioner filed supporting comments reiterating its intention to apply for the channel. Petitioner also states that there are numerous sites available from which a station could provide a predicted city-grade signal to Dickson.

2. Channel 229A can be allotted to Dickson in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.3 kilometers (7.0 miles) east of the city.[1] The restriction is required in order to provide protection to vacant but applied for Channel 229A at Huntingdon, Tennessee.

3. Based on the aforementioned, we believe the public interest would be served by allotting Channel 229A to Dickson, Tennessee, as that community's second local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 19, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Dickson, Tennessee	229A, 273C2

4. The window period for filing applications will open on **December 20, 1988,** and close on **January 19, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates are 36-06-03 and 87-15-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-594

In the Matter of

Amendment of Section 73.202(b),	RM-6100
Table of Allotments,	RM-6424
FM Broadcast Stations.	
(Huntsville and Centerville, Texas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 11, 1988; Released: November 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Don Werlinger, d/b/a The Broadcast Development Group, Inc. (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 163 (1988), proposing the allotment of Channel 278A to Huntsville, Texas, as that community's third local FM service.[2] Petitioner filed supporting comments stating a continuing interest in the allotment at Huntsville. In response to the *Notice*, Center-Dial, Inc. (Center-Dial), filed a counterproposal seeking the allotment of Channel 278A to Centerville, Texas, as a first local FM service. [3] Huntsville Broadcasting Group (HBG), filed comments stating that it or an entity of which its principals are a part will apply for Channel 278A at Huntsville. Petitioner and Walker County Communications, Inc. (Walker), licensee of Stations KSAM(AM) and KHUN(FM) at Huntsville filed reply comments.

2. Petitioner, in its reply comments suggests Channel 276A as an alternative to the counterproposal for Channel 278A at Centerville. Petitioner states that with the allotment of the alternative channel at Centerville an additional service could be provided at Hunstville. Petitioner urges the adoption of its alternative proposal in order to provide a greater public interest benefit with an additional FM service at Hunstville and a first local FM service at Centerville.

3. In its reply comments, Walker contends that the Commission should reject the expressions of interest for the allotment at Huntsville by the petitioner. Walker argues that the petitioner failed to state its intention to apply for the channel, if allotted, as required by the *Notice*. Therefore, Walker urges the denial of the Hunstville proposal. Walker claims that the petitioner's "carefully couched" statement of interest in the allotment leaves open the possibility that its involvement in filing an application would be as consulting engineer. Furthermore, Walker raises issues concerning the petitioner's financial qualifications to actually pursue an allotment at Huntsville. Walker submitted various documents to support its claim. Walker also notes that HBG's expression of interest is sketchy, and does not include a statement that HBG intends to construct the station in a timely manner.

4. Based on the information presented in this case, we conclude that HBG's expression of interest is *bona fide*. HBG specifically states that, if the channel is allotted it will apply for and if its application is granted construct a station on the allotment. Although HBG did not explicitly state that it would promptly construct, we do not believe that omission renders HBG's expression nugatory. However, we are concerned with the manner in which the petitioner states its intention to "make application" or "be personally responsible for the tendering of an application." We are led to believe on the basis of such ambiguous statements that the petitioner's interest may be to solicit prospective applicants and prepare the applications as a consulting engineer.[4] Thus, we believe the petitioner has failed to state unequivocally its intention to actually apply for the channel and operate a station at Huntsville. Therefore, further consideration of the Huntsville proposal shall be at the request of HBG.

5. Our staff engineering analysis confirms that Channel 276A is available for use at Centerville. Channel 276A can be allotted to Centerville in compliance with the Commission's minimum separation requirements.[5] In view of the fact that there is an alternative channel available to resolve the conflict, Channel 278A can be allotted to Huntsville as proposed in the *Notice*. Channel 278A can be allotted to Huntsville consistent with the Commission's minimum distance separation requirements with a site restriction of 2.3 kilometers (1.4 miles) southwest of the city.[6] The restriction is required in order to avoid a short spacing to Station KJCS(FM), Channel 277C1, Nacogdoches, Texas.

6. In view of the aforementioned, we believe the public interest would be served by the allotments of Channel 276A to Centerville, Texas, and Channel 278A to Huntsville, Texas. The allotments could provide a first local FM service at Centerville and Huntsville could receive its third local FM service.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 19, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Centerville, Texas	276A
Huntsville, Texas	235A, 269A, 278A

8. The window period for filing applications will open on **December 20, 1988,** and close on **January 19, 1989.**

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Centerville, Texas, has been added to the caption.

[2] The Commission recently allotted Channel 235A to Huntsville, Texas, as a second local FM service. *See Report and Order* in MM Docket No. 87-209, adopted September 14, 1988.

[3] Public Notice of the counterproposal was given on June 22, 1988, Report No. 1735 (RM-6424).

[4] It should be noted that a consulting engineer requesting an allotment on his or her own behalf, like all other eligible petitioners for proposed allotments, is required to state unequivocally an intention to apply for the channel if it is allotted, and if authorized, to build a station.

[5] The reference coordinates are 31-15-36 and 95-58-42.

[6] The restricted site coordinates for Channel 278A at Huntsville are 30-43-24 and 95-33-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-508

In the Matter of

Improved Methods for Calculating
Skywave Field Strength in the
AM Broadcast Band

NOTICE OF PROPOSED RULE MAKING

Adopted: October 13, 1988; Released: November 4, 1988

By the Commission:

INTRODUCTION

1. The Commission is initiating this proceeding (*Notice)* to examine its Rules relating to skywave propagation in the AM broadcast service. In particular, the Commission is considering replacing the existing skywave propagation curves contained in the FCC Rules with a new skywave propagation model recently developed. The Commission believes that this new model is more accurate and reflects the latest understanding of skywave propagation as applied to the AM broadcast service.

2. This proceeding is an outgrowth of the *Notice of Inquiry*, MM Docket No. 87-267, 52 FR 31795, August 24, 1987, (*Inquiry)* which provided a comprehensive review of the Commission's AM broadcast assignment criteria and related matters.[1] Its goal was to identify any needed changes to the Commission's Rules which would permit AM stations to improve their service to the public and enhance their ability to compete in the market place.[2]

3. The Commission discussed a number of issues specifically related to skywave propagation in its *Inquiry*. In particular, one alternative discussed is to replace all of the current skywave propagation curves and procedures in the FCC Rules with a new, improved skywave propagation model recently developed by FCC staff. Several related matters were also discussed in the *Inquiry*, notably, the effects of geomagnetic latitude of a propagation path upon skywave field strength, the most appropriate hour of the night upon which to base the new propagation model (referred to as the reference hour), procedures for calculating field strength values exceeded for 10% of the time, and calculation procedures to be employed for short propagation paths.

4. We recognize that changes to the Commission's Rules to reflect new procedures for calculating skywave field strength may well have, among other things, an effect on the portrayal of existing service and interference as well as an effect upon future calculations related to new and modified AM facilities. However, we believe that consideration at this time of procedures providing improved accuracy would facilitate future consideration of other possible changes to the Commission's technical assignment criteria. This would provide accurate skywave field strength calculations for use in assessing the interrelationships of such proposed changes. Ultimately, improved accuracy in skywave calculations would ensure that proposed new or modified AM stations would provide intended protection to other stations, or, conversely, that such proposed changes would not be unnecessarily restricted.

5. A substantial number of public comments addressing skywave propagation issues were received in response to the *Inquiry*. These comments provide a general consensus supporting consideration of the new and improved methods for calculating skywave field strength suggested by the Commission in its *Inquiry*. For all of the reasons discussed, we believe that the time is now ripe for considering changes to the procedures for calculating skywave field strength as proposed in the following sections.[3] Before addressing these proposed changes, however, the following background information is provided.

BACKGROUND

6. The AM broadcast service is the oldest broadcasting service, but it still remains one of the most technically complex to administer. This is due in large part to the propagation conditions that exist in the AM broadcasting band. In contrast to the other frequency bands where broadcast services are authorized, the propagation characteristics of the AM band vary with the time of day. During day time hours, signal propagation of an AM station is predominantly by groundwave signals. Groundwave signals travel along the surface of the earth and are thus affected by the characteristics of soil conductivity along the propagation path.

7. During nighttime hours, however, skywave signals from an AM station reach distances many times greater than its groundwave signals. Skywave signals are reflected from the ionosphere[4] and can be propagated many hundreds of miles from the transmitter location. Nighttime propagation has both positive and negative implications. On the one hand, nighttime skywave can be employed to provide skywave service many hundreds of miles from the transmitter, whereas, on the other hand, such enhanced conditions also increase the interference possibilities of co-channel stations over distances of hundreds of miles. As a consequence, co-channel stations that could be located reasonably close to one another without interference during daytime hours could cause significant mutual interference during nighttime hours.

8. Field strength calculations for determining skywave service and skywave interference are performed in accordance with Section 73.182 of the FCC Rules. Currently these procedures employ three sets of skywave field strength curves contained in Section 73.190 of the FCC Rules. The first set of curves, Figure 1a, is used for calculating the skywave service areas for Class I stations as well as the levels of interfering field strength for Class I and Class II stations on clear channels; hence, they are sometimes referred to as the FCC clear channel curves.[5] A second set of curves, Figure 2, isused for calculating levels of skywave interference on regional and local channels. Figure 1b, the third set of curves, is used for all skywave field strength calculations involving one or more stations in Alaska regardless of channel or station class.[6]

9. These three sets of skywave curves are empirically derived, that is, they are based upon observations of propagation phenomena obtained through FCC skywave field strength measurement programs. For example, Figure 1a

was derived from short-term field strength recordings taken in the spring of 1935,a relatively low solar activity period (*i. e.*, a period corresponding to low sunspot numbers).[7]

10. In order to gain a better understanding of skywave propagation phenomena, the FCC initiated a long-term field strength measurement program in 1939 which continued for a full solar activity cycle, *i. e.*, eleven years. Soon after this program began, it became clear that skywave field strength is a function of many factors, including latitude and sunspot number.[8] Figure 2 was then developed from data acquired for the year 1944 of this long-term program.[9] Minimum solar activity occurred in 1944 resulting in maximum levels of skywave field strength. Such a year represents a "worst case" for determining the effects of skywave interference upon the service provided by AM stations during nighttime hours.

11. Data from the Commission's long-term field strength measurement program for 26 propagation paths were released in 1971 and have been studied by the FCC as well as a number of researchers from different parts of the world. Among other things, it has been found that the effects of latitude are so great that the 1944 FCC data, which represents only a narrow range of latitudes, are inadequate. Consequently, in order to collect supplemental data, the Commission in 1980 initiated a low-latitude skywave measurement project (Central America to southern U.S.) and in 1981 initiated a high-latitude measurement project (coterminous U.S. to Alaska).[10] Several administrations (*e. g.*, Brazil and Mexico) have contributed a substantial amount of data from the low-latitude areas. The high-latitude field strength measurement program contributed to the development of the interim curve in Figure 1b of the FCC Rules discussed *supra*. In adopting Figure 1b, it was anticipated that a final set of curves would be developed upon conclusion of the measurement project.

DISCUSSION

12. The FCC staff has continued its efforts to develop a better understanding of skywave propagation phenomena. Based on analysis of data collected during the Commission's long-term skywave field strength measurement program as well as data collected during the more recent low-latitude and high-latitude skywave measurement projects, our understanding of skywave propagation characteristics has improved significantly. As a result, we have identified certain shortcomings of the current FCC skywave field strength curves.

13. We now know that skywave at tenuation increases by about 1 dB (in a year of low sunspot activity) for every degree of latitude that a radio path midpoint moves farther north. This reduces skywave propagation in northern areas by an appreciable amount. For example, a station in Texas may produce a skywave signal of 0.5 mV/m at a distance of 800 miles from its transmitter; that same station in Minnesota may produce a 0.5 mV/m signal at a distance of only 500 miles. Figure 1a of Section 73.190 of the FCC Rules does not provide a means for adjusting skywave field strength as a function of geomagnetic latitude. Figure 2 is partially correct in its conceptual approach because it treats interference levels as a function of geographic latitude. Geomagnetic latitude rather than geographic latitude is the more determinative factor.[11] The effect of these shortcomings is magnified by the increasing demand for spectrum and growing concerns regarding nighttime interference as the band becomes more congested.

14. Other important characteristics of skywave propagation also have been observed during the staff's on-going studies. Use of a reference hour of six hours past sunset (SS+6) rather than two hours past sunset (SS+2) is a more accurate reference upon which to base skywave calculations. Moreover, it has been determined that use of the slant distance for a propagation path rather than the great-circle path distance results in greater accuracy.[12] Finally, it has been learned that differences between skywave field strength exceeded 50% of the time and skywave field strength exceeded 10% of the time vary with the geomagnetic latitude midpoint of the propagation path.[13]

15. The following proposed changes to the Commission's current Rules for calculating skywave field strength incorporate all of these observed skywave propagation characteristics. These proposals address, *seriatum*, a new skywave propagation model, use of the slant distance of a propagation path, a new proposed reference hour for the new propagation model, and a procedure for calculating skywave field strength exceeded 10% of the time. Comments are invited on these proposed changes, and, in addition, the Commission will consider alternative proposals which may provide potential improvements related to calculating skywave field strength in the AM broadcast service.

16. *New Skywave Model.* The *Inquiry* discussed several alternatives for improving methods for performing skywave field strength calculations, including various modifications to the existing curves in Section 73.190 ofthe FCC Rules. Emphasis was placed, however, upon consideration of replacing all of the existing curves, Figures 1a, 1b, and 2 of Section 73.190 of the FCC Rules, with a new model identified as the "modified method".[14] Studies performed by members of the FCC staff indicated that this "modified method" ismore accurate than the three sets of curves currently in Section 73.190 of the FCC Rules and takes into account the effects of the geomagnetic latitude of the propagation paths.

17. Comments filed in response to the *Inquiry* were overwhelmingly in favor of using the most advanced method available and recommended use of the"modified method". Comments submitted by the Corporation for Public Broadcasting (CPB) typify several of the comments received. CPB noted that reliance on precise methodologies and current data will ensure that the assignment principles continue to reflect the real world, not a theoretical environment. Moreover, CPB indicated its belief that the imprecision of thecurrent propagation curves is, for the most part, unnecessary with the availability to the FCC and the industry of sophisticated computer technology and extensive data previously unavailable.

18. Based upon its review of the "modified method", Capital Cities/ABC, Inc. (Capital Cities) concurs that this method should be used in determining protected contours as well as interference levels. CBS, Inc. (CBS) supports the Commission's effort to implement the most current data and precise methods for calculating interference. CBS notes that where accurate measurements of interfering signals and protected contours are not available, interference may be caused where none was calculated, or the parameters of a station may be unnecessarily constrained. The Clear Channel Broadcasting Service (CCBS), how-

ever, urges the Commission to proceed with caution in this proceeding. CCBS expressed general concerns about the potential adverse consequences of recalculating service and interference that could result with a new propagation model.

19. Based upon the comments and our own assessment of the benefits that would be derived from adoption of an improved skywave propagation model, we propose amending the Rules to incorporate the use of the new propagation model described in Appendix B of this *Notice*. This new model is based upon the empirical data collected by the Commission during its extensive skywave measurement programs and is characterized by a formula. This new model is identical to the "modified method" discussed in the *Inquiry* except for differences discussed *infra*.

20. An important element included in the new skywave propagation model is a term that fully accounts for the effect of the geomagnetic latitude of the propagation path on skywave field strength. As discussed *supra*, geomagnetic latitude has a significant effect upon propagated skywave field strength. The inclusion of this term would result in a more accurat edepiction of skywave service contours for Class I clear channel stations as well as interference calculations on all channels.[15] We are proposing to usethe geomagnetic latitude of the great-circle midpoint of the propagation path for these calculations. Appendix B also includes formulas for converting geographic latitude to geomagnetic latitude.

21. Although it is possible to derive graphical methods from the formulas for determining skywave field strength, we propose to make the formulas in Appendix B controlling in order to avoid disputes that can result from in accuracies of graphical methods. This action would be consistent with recent Commission actions in other cases where use of available formulas has been made controlling for the same reason. Additionally, since calculations based on the formulas would prevail in all cases and since the new propagation model is easily adapted for use on computers, we do not believe there is need to include curves in the FCC Rules.[16]

22. *Use of Slant Distance*. In our discussion of the "modified method" in the *Inquiry*, we had suggested that great-circle distances would be used in the calculations for propagation paths of 200 km and greater. For propagation paths less than 200 km, it was suggested that the field strength factor at 200 km could be employed in the calculations at such distances.[17] There was general support in the comments received in response to the *Inquiry* for such an approach.[18] However, recent analysis conducted by the Commission indicates that it would be more accurate to use the slant distance for all propagation paths, regardless of path distance.

23. This conclusion is consistent with CCIR Recommendation 435 which recommends use of the slant distance for calculating skywave field strength for all propagations paths.[19] The accuracy of skywave calculations is most notably improved by use of the slant distance over any propagation path where the slant distance is large in relation to the great-circle distance. Medium waves are usually reflected by the E layer of the ionosphere which spans the altitude range of approximately 90 to 130 km. The current FCC Rules assume the average height of the E layer to be 96.5 km. Thus, even for a receiving point only 1 km away from the transmitter, the skywave may travel 193 km to reach its destination. An increase between the transmitting and receiving points, within a certain range, will not result in a significant change in the slant distance. For example, if the distance between the two points is increased to 100 km, the actual slant distance only increases 24 km. Thus,the skywave signal must travel nearly as far to reach a receiver near the transmitter as it does to reach a receiver several hundred kilometers away.

24. The new propagation model that we are proposing specifies use of slant distance for all propagation paths, regardless of path distance. This ensures use of the most accurate calculation methodology without significantly adding to the complexity of the calculations. For the purpose of the new model, it should be noted that the height of the E layer of the ionosphere above the earth is assumed to be 100 km. The elevation angle for the propagation path would continue to be determined on the basis of the actual great-circle distance in accordance with the formula in Section 73.190(d) of the FCC Rules.

25. *Reference Hour*. Several decades ago, the FCC adopted two hours after sunset (SS+2) as the reference hour for its propagation models in AM broadcasting. It was believed that the ionosphere was fully stabilized and field strength maximized at two hours after sunset. This early conclusion subsequently has been found to be incorrect. Soon after the FCC started itslong-term measurement program in 1939, it became apparent that field strength sat SS+6 were appreciably stronger than those at SS+2.[20] It was assumed that the difference was one of degree only. More recent studies, however, show that propagation conditions at SS+2 and SS+6 are significantly different. It is far more than a difference of degree; it is a difference of kind. It has been shown that at SS+2 the residual effect of the D layer of the ionosphere still exists, complicating the prediction of skywave field strength. On the other hand, at SS+6 the effect of the D layer no longer exists and skywave propagation primarily occurs by reflection from the E-layer of the ionosphere and occasionally from the F-layer.

26. Recent findings also indicate that skywave field strengths at approximately SS+2 display a certain degree of frequency dependence (approximately 3 dB stronger at the higher frequencies). At SS+6, frequency dependence becomes insignificant. Thus, we have concluded from our studies that the current curves in Section 73.190 of the FCC Rules which are based on the reference hour of SS+2 are more accurate at the higher frequencies. We believe that use of the reference hour of SS+6 for the new skywave propagation model would result in improved uniformity throughout the AM band and all frequencies would be treated in the same manner.[21]

27. There are also indications that use of SS+6 as the reference hour would result in skywave field strength predictions that are more uniform for propagation paths in all directions. Based on data collected by the FCC corresponding to SS+2, Crombie (*IEEE Transactions on Broadcasting*, September 1979) reported that at tenuation by the ionosphere on east-west paths is greater than that for paths in other directions. Thus, observed field strengths on north-south paths are usually stronger than those on east-west paths of comparable lengths at SS+2. Comparison with measured data indicates that Figure 1a of Section 73.190 of the FCC Rules appears to be more accurate for north-south paths. Very recently, a large amount of data for SS+6 has been studied by Commission staff and the effects of path orientation reported for data collected at SS+2 were not noted.

28. Finally, Commission studies have determined that the attenuation of field strength related to sunspot number is less pronounced at SS+6. In preparation for the Region 2 Administrative Radio Conference to Plan the Band 1605-1705 kHz, Commission staff studied a large amount of previously unanalyzed or partially analyzed measurement data, including measurements taken at SS+6. Among other things, it has been found that the at tenuation of field strength corresponding to the number of sunspots is the greatest during the period of daytime to SS+2 (*i. e.*, during the hours that the D layer of the ionosphere affects skywave propagation). This at tenuation gradually diminishes after SS+2 and reaches a minimum at approximately SS+6.[22]

29. Most public comments received in response to the *Inquiry* on this issue generally supported using SS+6 as the reference hour for the new propagation model. For example, CCBS indicated its belief that it is imperative that SS+6 be used if the objective of the new propagation model is improved accuracy. The Association for Broadcast Engineering Standards, Inc.(ABES) recommended including this issue in this *Notice* for further consideration. On the other hand, Edward A. Schober, consulting engineer,(Schober) commented that SS+2 provides a good weighting for the time of maximum radio listenership during the night hours. Likewise, Bonneville International Corporation (Bonneville) suggested retaining SS+2 as thereference hour, or, alternatively, defining protection standards 24 hours a day by using the Commission's diurnal curves contained in Figure 12 of Section 73.190 of the Rules.

30. After considering the comments and the results of our own studies on this matter, we have concluded that use of SS+6 as the reference hour for the new propagation model has merit. We believe that this would ensure uniform calculations for all frequencies and propagation paths. Moreover, this reference hour would better represent the "worst case" for interference calculations, thus minimizing the levels of new interference that would be introduced in the future. The formula in Appendix B for the new propagation model includes a 2.5 dB factor to account for the greater field strength that occurs at SS+6.

31. *Conversion Factor for 10 % Skywave Field Strength.* A final matter that needs to be considered concerns the procedure for calculating skywave field strength exceeded 10% of the time. The new model being proposed depicts field strength values exceeded 50% of the time and it is necessary to apply a factor to convert to field strength exceeded 10% of the time. As noted earlier in this *Notice*, field strength exceeded 10% of the time is used in calculating skywave interference, whereas, skywave field strength exceeded 50% of the time is used for calculating the skywave service contours for Class I clear channel stations. Commission studies of skywave propagation data indicate that this conversion factor is affected by the midpoint geomagnetic latitude of the propagation path. Thus, this factor varies from approximately 6 dB in the low-latitude areas (*e. g.*, Mexico) to more than 10 dB in the high-latitude areas (*e. g.*, Oregon and Alaska).[23] For administrative convenience,an 8 dB factor was adopted in the Final Acts of the Region 2 Administrative Radio Conference (1981, Rio de Janeiro) and is currently specified in Section 73.190 of the Rules for use with Figure 1a in the coterminous U.S.[24]

32. Most commenting parties responding to the *Inquiry* did not provide guidance on this issue. CCBS and Schober suggest calculation of the applicable factor for each path. CCBS further suggested development of a simple curve to portray the variation between 50% and 10% field strength values with geomagnetic latitude. In contrast, Bonneville suggested that a uniform factor of 8 dB is acceptable.

33. There are several alternatives that could be considered for determining the conversion factor. One alternative would be to use a single factor, *e. g.*, 8 dB, for all propagation paths. Another would be to establish several factors that would be applicable in three zones defined by latitude. However, none of these approximations would provide the degree of accuracy that would result from specific calculations of the factor for the actual geomagnetic latitude for any given propagation path. We believe, therefore, that a procedure that would require the specific conversion factor to be determined for each propagation path is preferred and would optimize accuracy for interference calculations on such paths. A formula, shown in Appendix B,has been developed that depicts the conversion factor as a function of geomagnetic latitude. We are proposing use of this formula in determining the applicable conversion factor.

OTHER MATTERS

34. Several parties commenting in response to the *Inquiry* were concerned about the impact that use of new skywave propagation curves would have on the existing AM broadcast service. For instance, although endorsing the use of more accurate skywave curves, several commenters urged the Commission not to implement their use until other AM assignment criteria were fully considered in rule making. ABES and CBS, for example, are supportive of the "modified method", adding that a rule making proceeding on this subject should be instituted. Such a proceeding, according to ABES, would permit a more detailed evaluation of its technical aspects as well as the potential impacton existing AM broadcast service such as changes in interference levels to existing stations, issues related to the processing of applications, and the potential for added administrative burdens. CCBS cautions that adoption of a new skywave propagation model could lead to massive disruption of AM service as interference and service areas are recalculated. As a result, CCBS urges the Commission not to move forward with a change in the methods for predicting AM skywave propagation unless and until the Commission has concluded its investigation into the other related topics set forth in the *Inquiry*.

35. As we discussed *supra*, we are cognizant of the relationship between the skywave propagation model which we are considering in this *Notice* and other assignment criteria that may be considered in future rule making proceedings. We noted in the *Inquiry* that use of a new propagation model could result in changes to the location of service contours and calculated levels of interference. The Commission's staff has performed calculations using the "modified method" on a limited number of regional channels and clear channels which are believed to be representative channels.[25] These studies generally indicate that the predicted nighttime service of Class III stations using a reference hour of SS+2 will be greater than previously depicted using current calculation procedures. On the other hand, use of a reference hour ofSS+6 reduces the calculated service area. In the case of clear

channel stations, the staff's calculation at a reference hour of SS+2 indicates that the skywave service areas of class I stations are substantially reduced at higher latitudes, and to a lesser degree at a reference hour of SS+6.[26]

36. We do not believe, however, that this fact should restrict us from proceeding with rule making at this time in order to develop a record on this issue.[27] Such a record will guide the Commission on appropriate actions which ultimately should be taken. We believe, however, that there may be practical reasons for considering a delay in implementing a new propagation model, if adopted, until consideration of other possible changes to interrelated technical assignment criteria is concluded. Rather than implementing various changes to the technical assignment criteria in a "piece meal" fashion, there may be merit in considering implementing simultaneously all the inter related changes that may ultimately be adopted. This approach could minimize administrative burdens for the Commission as well as uncertainties within the industry. We seek comment on the advisability of such an approach.

37. It would not be our intent to require any modifications of existing operations as a result of the changes proposed in this Notice. Moreover, we believe that the same principle would apply to applications pending at the time any changes proposed herein are implemented.

ADMINISTRATIVE MATTERS

38. Authority for the rule changes on which comments are invited is contained in Sections 4(i), 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 307.

39. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **December 27, 1988** and reply comments on or before **January 11, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference (Rm. 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

40. For the purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3)issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

41. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2),if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1201(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

42. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities.The IRFA is attached as Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule Making*, including the Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.*, (1981).

43. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form,information collection and/or record keeping, labeling, disclosure, or record retention requirements, and will not increase burden hours imposed on the public.

44. For further information on this proceeding, contact Larry W. Olson,Mass Media Bureau, (202) 632-6955.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS I.

Reason for Action: In this proceeding, we seek public comment on the desirability of replacing the existing AM broadcast skywave propagation curves with a new propa-

gation model recently developed. The new model results from recent scientific analysis of skywave measurement data that provides a better understanding of skywave propagation phenomena. Use of the new method for calculating skywave field strength in the AM service would provide a more accurate depiction of the service and interference relationships between AM stations.

II. Objective: The proposed changes are intended to modify provisions of the Rules which have been found to be inaccurate. This is in keeping with the Commission's efforts to update and improve the standards upon which the AM service is based so as to reflect the actual representation of service and interference.

III. Legal Basis: Sections 4(i), 303 and 307 of the Communications Act of 1934, as amended,47 U.S.C. §§154(i), 303, and 307.

IV. Description, Potential Impact and Number of Small Entities Affected: There are approximately 5000 AM broadcast stations in the United States. None of these stations should be affected directly by this proposal since the changes proposed only relate to the standards (curves and formulas) used to calculate skywave field strength. We expect no negative impact to these stations, small entities or large, as we are not mandating any new requirements or showings. Actual interference is not expected to increase as a result of the specific changes proposed in this *Notice*. We will, however, consider in future rule making proceedings the related questions regarding assignment principles which, together with the propagation model, may result in new definitions of service and interference for AM broadcast stations. Such definitions are not now known but are intended to be beneficial to the AM service as a whole.

V. Reporting Record Keeping, and other Compliance requirements: There is no additional impact.

VI. Federal Rules that Overlap, Duplicate or Conflict with These Rules: There is no overlap, duplication, or conflict.

VII. Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objectives: There are no significant alternatives available.

FOOTNOTES

[1] The *Inquiry* was issued after review of the comments received in response to the Mass Media Bureau's *Report on the Status of the AM Broadcast Rules*, RM-5532, (*Report*) released April 3, 1986. The *Report* discussed the status of AM broadcasting and addressed a large number of technical, legal, and policy issues.

[2] By *Order*, DA 87-1823, released December 15, 1987, the Commission granted a "Motion for Extension of Time for Filing Comments and Reply Comments" submitted by the National Association of Broadcasters (NAB). Inthat *Order*, the Commission bifurcated the proceeding and established separate filing periods. Phase 1 involved Sections II and III of the *Inquiry* whilePhase 2 involved Sections I and IV. For the specific issues raised in Section III (Related Technical Issues) of the *Inquiry* under which skywave propagation falls, the time for filing comments and replies was extended to February 1,1988 and March 1, 1988, respectively.

[3] This proceeding will examine only those issues pertaining to skywave propagation. Where appropriate, the Commission will institute future rulemaking proceedings to deal with the remaining issues addressed in the *Inquiry* and public comments. For example, in a similar action today, the Commissionin stituted a proceeding concerning groundwave propagation. *See* , *Notice of Proposed Rule Making*, MM Docket No. 88-510, FCC 88-326.

[4] The ionosphere is a region of the earth's atmosphere consisting of several layers subject to ionization. These layers are alphabetically designated and have varying effects on radio waves. Pertinent to the propagation of AM broadcast signals are three ionization layers (D, E, and F). The distance of these layers above the earth varies from approximately 50 km for the D-layer (nearest the earth) to approximately 300 km for the F-layer (farthest from the earth).

[5] A version of Figure 1a was adopted by the Region 2 Administrative Radio Conference, Rio de Janeiro, 1981.

[6] Figure 1b is an interim curve adopted for use pending completion of further analysis of field strength measurement data subsequently collected. *See* , *Report and Order* in MM Docket No.83-807, 49 FR 43957, November 1, 1984.

[7] The occurance of sunspots on the surface of the sun rises and falls in a periodic relationship over an eleven year cycle. Each year in the cycle is assigned a sunspot number which is proportional to the solar activity of the sun for that given year.

[8] Observations indicate that skywave field strengths increase as the sunspot number decreases.

[9] Field Strength recordings were made on more than 40 paths ranging from 165 to 4176 km with transmitting frequencies ranging from 540 to 1530 kHz. The midpoint geomagnetic latitudes of these paths are between 40 and 54 degrees North. Figure 2 differs from Figure 1a in one major respect by giving weight to the effects of geographic latitude and depicts a family of curves ranging from 36 degrees to 50 degrees geographic latitude.

[10] The high-latitude field strength measurement program has been completed and the results are expected to be published later this year.

[11] There are two latitude terms which apply to this discussion. The first, geographic latitude, refers to a physical location of a point on the surface of the earth relative to the north and south poles. The second, geomagnetic latitude, takes into account the effects of the earth's magnetic influence on radio waves and is based on the magnetic poles. Geomagnetic coordinates are similar but not identical to geographic coordinates. The geomagnetic northpole is located at 78.5 degrees North and 69 degrees West. Geophysical phenomena, including absorption of electro magnetic waves, are better related to geomagnetic latitudes.

[12] Slant distance is the total distance that a skywave signal travels along a propagation path including the distance traveled to and from the E layer of the ionosphere.

[13] The FCC Rules specify that the skywave service areas of Class I stations are to be calculated using skywave field strength exceeded 50% of the time, whereas, interfering skywave signals are computed using skywave field strength exceeded 10% of the time.

[14] In preparation for the Region 2 Administrative Radio Conference for the band 1605-1705 kHz, the Commission's staff developed the "modified method".It was adopted by that Conference as a recommended method for calculating interregional interference. *See* , "A Skywave Propagation Study in Preparation for the 1605-1705 kHz Broadcasting Conference" by J. Wang, *IEEE Transactions on Broadcasting*, Vol. BC-31, No. 1, pp. 10-17, March 1985.

[15] At one time the calculation of service contours using such a procedure was laborious, but the current wide-spread availability of computers facilitates such calculations.

[16] Parties who believe that curves should be included in the FCC Rules should provide practical reasons for that position. It is our preliminary view that parties could individually prepare curves for their own use if such convenience is desirable.

[17] It was noted in the *Inquiry* that the slant distance changed little forgreat-circle distances less than 200 km.

[18] Currently, Figures 1a and 2 of Section 73.190 of the FCC Rules contain a gap in the range of 0-100 km where no skywave field strength values are provided. Occasionally, there is a need to compute field strength for such short paths and no method is specified in the FCC Rules.

[19] The Consultative Committee on International Radio (CCIR) is a technical body of the International TelecommunicationUnion within which administrations from around the world contribute and exchange technical information. The CCIR develops recommendations based upon this broad base of data and information on issues where technical advances have been achieved.

[20] *See* , "Prediction of MF Skywave Field Strength in North America", *IEEE Transactions on Broadcasting*, Vol. BC-23, No. 2, pp. 43-49, June 1977.

[21] *See* , FCC Technical Memorandum OST TM83-4.

[22] As an example, consider the propagation path for WLW, Cincinnati, OH to Portland, OR (700 kHz, 3192 km, 53 degrees North geomagnetic latitude). During Sunspot Cycle 18, as the sunspot number increased from its minimum to maximum, field strength for SS+2 decreased by 16.9 dB, that for SS+4 decreased by 13.3 dB, and that for SS+6 decreased by only 7.3 dB.

[23] The populated areas of the United States cover a wide range of geomagnetic latitudes: Honolulu, 19.5 degrees North; Virgin Islands, 30 degrees North; Fairbanks, 64 degrees North.

[24] A 13 dB factor had been previously adopted by the FCC for use with Figure 1b of the Rules when stations in Alaska are involved in calculations. We now believe that it would be more appropriate to use a 10 dB factor in conjunction with the "modified method" where stations in Alaska are concerned.

[25] The results of these calculations are contained in Appendix C of this *Notice*. RSS (root-sum-square) calculations for three regional channels have been included as well as two examples of the skywave service provided by Class I stations at high-latitudes and low-latitudes.

[26] A true comparison between current calculation procedures and those proposed in this *Notice* are possible only at SS+2 because current procedures are based upon that reference hour.

[27] A related issue concerns those situations where the new skywave calculation procedures and any related technical changes to the Commission's Rules result in received levels of interference less than that permitted for the normally protected contour.

APPENDIX B - CALCULATION OF SKYWAVE FIELD STRENGTH

The following formulas are proposed to be used in place of the curves in Section 73.190 of the FCC Rules. The methods used to determine other factors such as radiation value, elevation angle, and $f(\theta)$ are unchanged and can be determined by referring to the appropriate section of the FCC Rules.

1. Skywave field strength, 50% of the time (at SS+6):

The skywave field strength, $F_s(50)$, for a characteristic field strength of 100 mV/m at 1 km is given by:

$$F_s(50) = 137.5 - 20\log D) - (2\pi + 4.95\tan^2\theta_M)\sqrt{(D/10000)} \quad \text{dB}(\mu\text{V/m}) \tag{1}$$

The slant distance, D, is given by:

$$D = \sqrt{40{,}000 - d^2} \quad \text{km} \tag{2}$$

The geomagnetic latitude of the midpoint of the path, θ_M, is given by:

$$\theta_M = \arcsin[\sin a_M \sin 78.5^\circ - \cos a_M \cos 78.5^\circ \cos(69 - b_M)] \quad \text{degrees} \tag{3}$$

The short great-circle path distance, d, is given by:

$$d = 111.18 d^\circ \quad \text{km} \tag{4}$$

Where:

$$d^\circ = \arccos[\sin a_T \sin a_R + \cos a_T \cos a_R \cos(b_R - b_T)] \quad \text{degrees} \tag{5}$$

Where:
a_T is the geographic latitude of the transmitting terminal (degrees)
a_R is the geographic latitude of the receiving terminal (degrees)
b_T is the geographic longitude of the transmitting terminal (degrees)
b_R is the geographic longitude of the receiving terminal (degrees)
a_M is the geographic latitude of the midpoint of the great-circle path and is given by:

$$a_M = 90 - \arccos\left[\sin a_R \cos\left(\frac{d^\circ}{2}\right) - \cos a_R \sin\left(\frac{d^\circ}{2}\right)\left\{\frac{\sin a_T - \sin a_R \cos d^\circ}{\cos a_R \sin d^\circ}\right\}\right] \quad \text{degrees} \tag{6}$$

b_M is the geographic longitude of the midpoint of the great-circle path and is given by:

$$b_M = b_R + k\left[\arccos\left(\frac{\cos(\frac{d^\circ}{2}) - \sin a_R \sin a_M}{\cos a_R \cos a_M}\right)\right] \quad \text{degrees} \tag{7}$$

Note(1): If $|\theta_M|$ is greater than 60 degrees, equation (1) is evaluated for $|\theta_M| = 60$ degrees.
Note(2): North and east are considered positive; south and west negative.
Note(3): In equation (7), $k = -1$ if $b_R > b_T$, otherwise $k = 1$.

2. Skywave field strength, 10% of the time (at SS+6):

The skywave field strength, $F_s(10)$, is given by:

$$F_s(10) = F_s(50) + \Delta \quad \text{dB}(\mu\text{V/m}) \tag{8}$$

Where:
$\Delta = 6$ when $|\theta_M| < 40$
$\Delta = 0.2|\theta_M| - 2$ when $40 \le |\theta_M| \le 60$
$\Delta = 10$ when $|\theta_M| > 60$

APPENDIX C

COMPARISON OF SKYWAVE FIELD STRENGTH CALCULATIONS

FREQUENCY: 560 KHZ

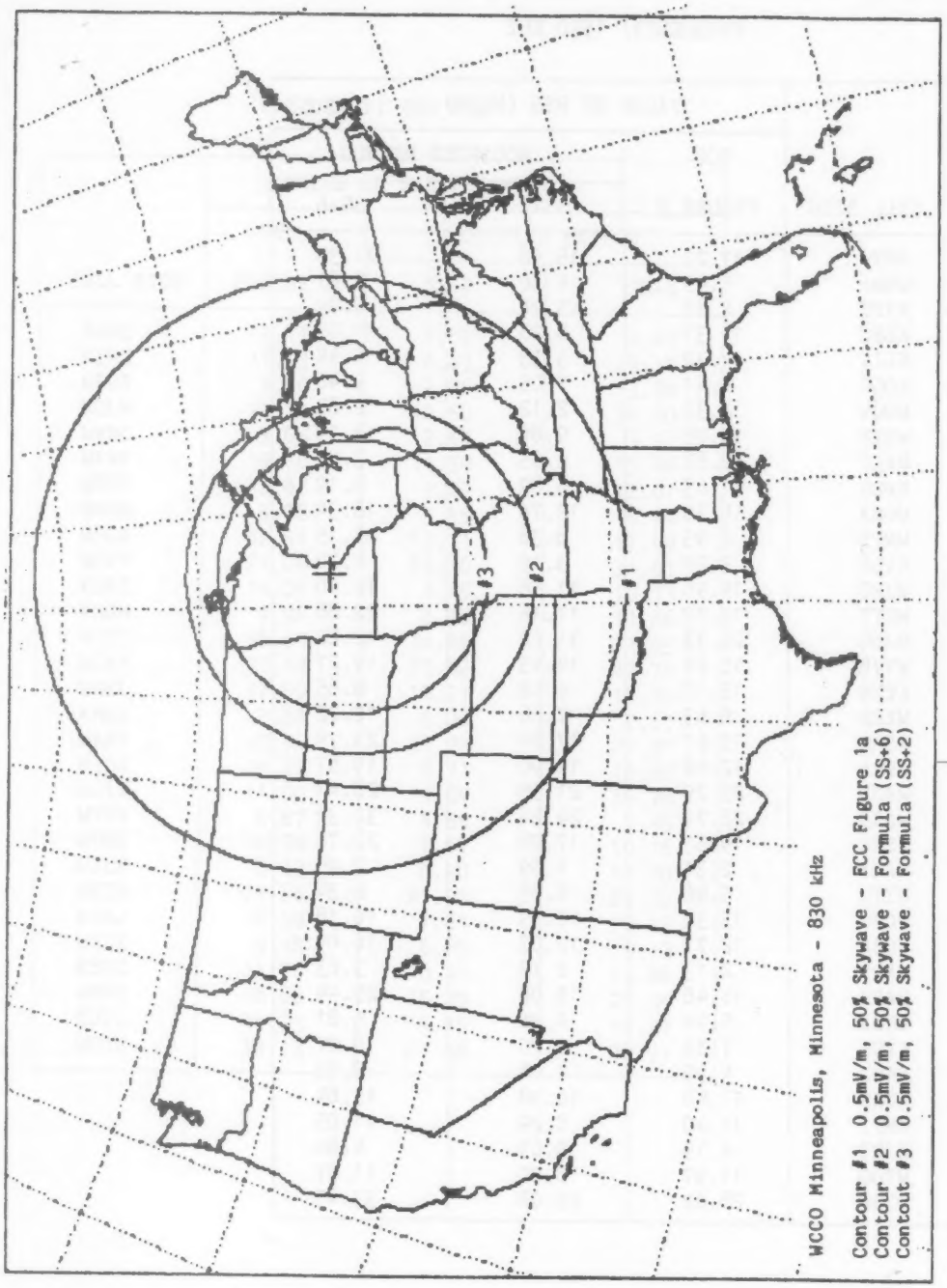
CALL SIGN	VALUE OF RSS (MV/M)		
	FCC	MODIFIED METHOD	
	FIGURE 2	SS+2	SS+6
KVOK	0.77	0.69	0.92
KBLU	6.23	4.88	6.51
KSFO	1.89	1.52	2.03
KLZ	2.41	1.71	2.28
WQAM	2.96	2.23	2.97
WIND	3.24	1.99	2.66
WHYN	4.21	4.14	5.52
WGAN	3.31	2.02	2.70
WEBC	28.38	15.47	20.63
KWTO	7.08	4.83	6.44
KMON	8.08	4.10	5.46
WGAI	18.05	14.70	19.60
WFIL	4.19	2.19	2.92
WVOC	4.66	2.74	3.65
WHBQ	9.77	6.50	8.67
KLVI	3.72	2.66	3.55
KPQ	2.83	1.61	2.15
WJLS	11.04	9.69	12.92

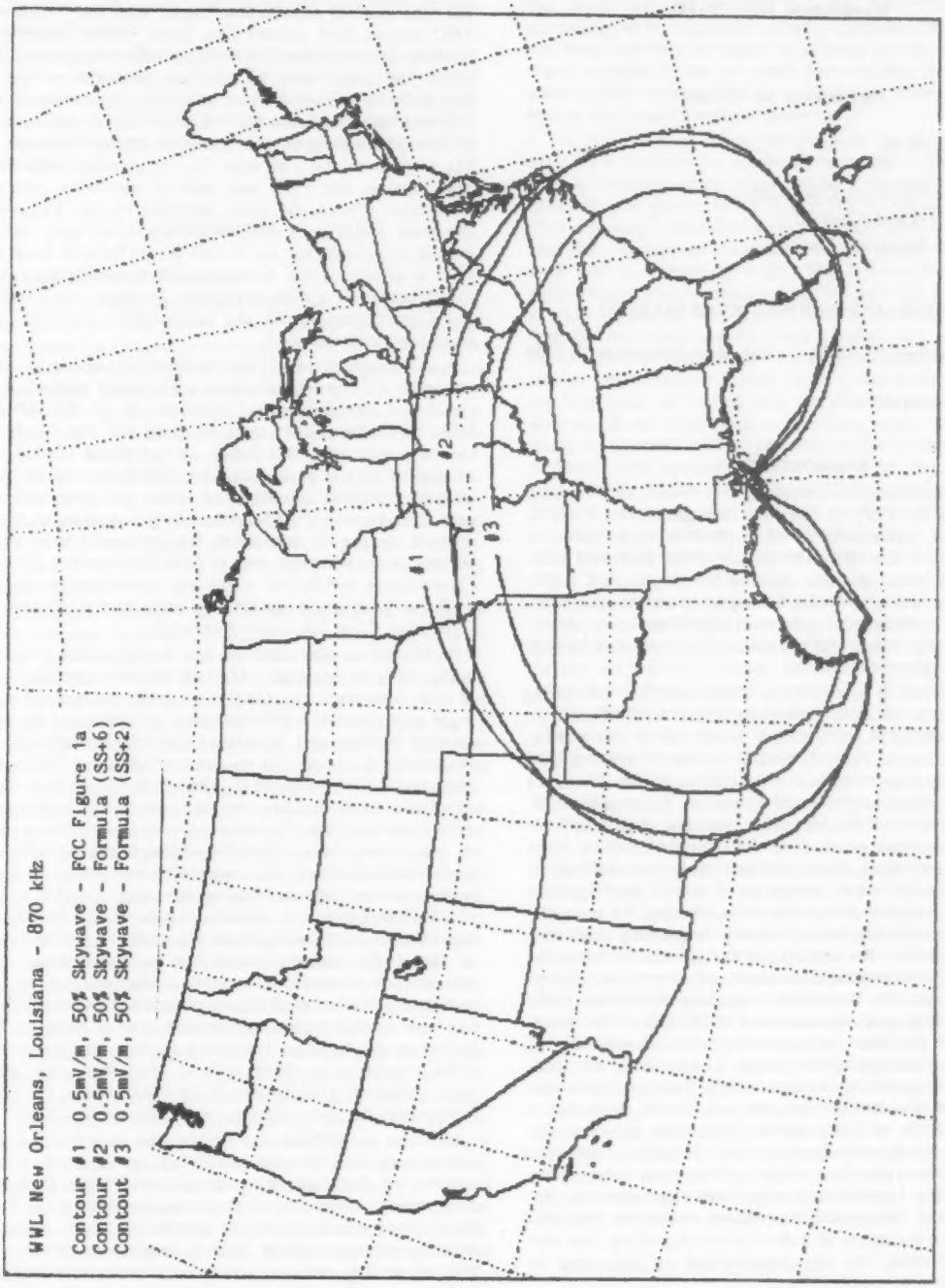
FREQUENCY: 980 KHZ

CALL SIGN	VALUE OF RSS (MV/M)		
	FCC	MODIFIED METHOD	
	FIGURE 2	SS+2	SS+6
KENY	2.11	1.85	2.47
KINS	11.13	6.83	9.10
KFWB	3.50	2.80	3.74
KGLN	14.11	10.50	14.00
WWRC	3.65	2.64	3.51
WFXP	15.76	11.59	15.46
WTOT	12.88	9.05	12.07
WWNN	5.78	4.45	5.94
WPGA	17.57	13.11	17.49
WGVT	21.06	23.70	31.61
KUPI	14.05	7.75	10.33
KSGM	9.98	8.90	11.86
WITY	18.60	16.46	21.95
WCAP	37.12	35.82	47.76
WAYL	17.50	10.71	14.28
KMBZ	2.81	2.00	2.67
WAAV	22.12	17.23	22.97
KICA	14.27	8.71	11.62
WJIW	11.00	11.84	15.78
WTRY	6.57	5.59	7.45
WONE	10.59	7.62	10.16
WILK	8.13	8.40	11.20
WBZK	24.66	21.90	29.20
KDSJ	14.59	7.81	10.42
WSIX	9.98	6.85	9.13
KSVC	14.76	10.41	13.88
WFHG	18.86	15.29	20.39
KUTI	14.83	14.45	19.27
WCUB	33.13	21.68	28.91

FREQUENCY: 1590 KHZ

CALL SIGN	VALUE OF RSS (MV/M)		
	FCC	MODIFIED METHOD	
	FIGURE 2	SS+2	SS+6
WGYJ	17.27	15.98	21.30
WVNA	5.45	4.36	5.81
KYDE	6.81	5.24	6.99
KSSU	11.31	8.28	11.04
KLIV	4.32	3.33	4.44
KOGO	7.41	7.05	9.40
WQQW	2.32	2.12	2.83
WRXB	12.05	9.89	13.19
WALG	2.83	2.65	3.53
KWBG	11.63	6.89	9.19
WONX	14.30	13.76	18.34
WNTS	8.93	8.36	11.15
KVGB	3.24	3.15	4.20
WJRO	14.95	11.55	15.40
WETT	19.72	17.16	22.88
WJBQ	26.33	31.66	42.22
WTVB	15.24	14.45	19.27
KCNN	13.17	6.49	8.65
WZRX	8.63	7.66	10.22
WSMN	15.61	17.84	23.79
WERA	12.46	14.90	19.87
WAUB	25.29	21.35	28.47
WASB	28.79	24.24	32.32
WEHH	19.53	17.08	22.78
WAKR	2.31	1.69	2.25
KTIL	5.96	4.75	6.34
WCBG	13.36	12.13	16.18
WCZN	12.77	12.07	16.09
WXRF	2.13	2.72	3.63
WARV	15.48	19.08	25.44
WUSJ	5.94	4.36	5.81
KYOK	7.83	6.20	8.27
KEND	4.95	4.44	5.93
KDAE	11.46	10.38	13.84
KMTI	13.40	8.29	11.05
KJET	4.19	3.63	4.84
WTOQ	11.97	8.90	11.87
WTRW	28.62	25.08	33.45


#3
#2
#1
WCCO Minneapolis, Minnesota - 830 kHz
Contour #1 0.5mV/m, 50% Skywave - FCC Figure 1a
Contour #2 0.5mV/m, 50% Skywave - Formula (SS+6)
Contout #3 0.5mV/m, 50% Skywave - Formula (SS+2)


WWL New Orleans, Louisiana - 870 kHz
Contour #1 0.5mV/m, 50% Skywave - FCC Figure 1a
Contour #2 0.5mV/m, 50% Skywave - Formula (SS+6)
Contout #3 0.5mV/m, 50% Skywave - Formula (SS+2)
#1
#2
#3

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-509

In the Matter of

Enhanced Nighttime Operation
for Class II-S and Class III-S
AM Radio Broadcast Stations

NOTICE OF PROPOSED RULE MAKING

Adopted: October 13, 1988; Released: November 4, 1988

By the Commission:

INTRODUCTION

1. The Commission is initiating this *Notice of Proposed Rule Making* (*Notice*) to consider changes in the rules to facilitate the enhancement of nighttime operations by Class II-S and Class III-S AM stations. The proposed rules would allow these stations to establish a separate nighttime antenna system without having to meet the minimum power, city coverage or minimum operating schedule requirements that otherwise would apply to such a change in their nighttime operations.

2. This *Notice* is part of the Commission's continuing efforts to create an environment in which AM stations can compete effectively and thereby better serve the public. To a considerable degree, recent actions involving AM stations have been based on the Mass Media Bureau's *Report on the Status of the AM Broadcast Rules*, RM-5532, released April 3, 1986 (*Report*), and the comments received in response to it. The *Report* addressed a large number of technical, legal and policy issues, seeking to identify opportunities to change or eliminate existing rules in order to assist AM broadcasters in meeting the competitive challenges facing them, thereby improving their service to the public. Recognizing that daytime-only stations face serious disadvantages because of their inability to operate at night, the Commission has implemented a number of proceedings to remove this limitation to the maximum extent possible consistent with sound engineering practice. For example, actions taken in a series of proceedings have allowed many daytime- only stations to become full-time stations. Nonetheless, we are of the view that it may be possible to take further steps to enhance the opportunity for former daytime-only stations to improve their nighttime operations while at the same time maintaining existing interference protection requirements. Before discussing the specific proposal, however, we will provide some background information regarding the various actions taken by the Commission in this area in recent years.

BACKGROUND

3. The current proposal can be seen as a continuation of the rule making process that began with the Commission's 1983 action first authorizing post- sunset operation by daytime-only stations.[1] Although many daytime-only stations had been able to conduct pre-sunrise operations (typically beginning at 6:00 a.m. local time), similar relief had not been available for the post- sunset period because of international agreements then in effect.[2] However, with the implementation of new AM agreements with Canada and Mexico, the FCC was able to authorize post-sunset operation. Under the rules adopted by the Commission, the great majority of daytime-only stations have been permitted to operate for up to two hours beyond local sunset with a power of 0.5 kW, reduced as necessary to avoid interference. A special computer program was created by the Commission to do the calculations involved and to issue the authorizations.

4. Although these actions brought important benefits, it was clear that pre-sunrise and post-sunset operation alone could not be expected to alleviate all of the difficulties faced by daytime-only stations. This led the Commission to study other possible relief, in particular the possibility of authorizing regular licensed nighttime operation with allowable powers calculated in much the same way as the post-sunset powers had been, using a computer program devised by the Commission. Studies established the feasibility of such a step, and in MM Docket No. 84-281 the Commission authorized nighttime operation by almost all of the daytime-only stations on what had previously been 14 foreign Class I-A clear channels.[3]

5. Nighttime operation on the foreign clear channels is being initiated in stages. During the first five-year period of such operation, the Commission has authorized a maximum power of 0.5 kW, reduced as necessary to protect existing foreign and domestic full-time stations on these channels. The power to be used is based on the station's daytime (or, if applicable, the station's critical hours)[4] antenna system. Because in many cases the initial powers were quite low, the Commission encouraged these stations to take other steps, typically through the installation of directional antennas, that would permit them to employ higher powers. Stations taking advantage of this opportunity had to propose a minimum power of 0.25 kW or its equivalent.[5] In allowing these increases in power, we stated that these stations would not be required to provide interference protection to one another during the initial five-year period of nighttime operation. However, after the five-year initial period, protection would have to be afforded to all stations, including former daytime-only stations, operating at night with at least minimum power.[6] Also, subject to this limitation on interference, the permissible power for these stations will increase to 1 kW.

6. Then, in MM Docket 87-131, the Commission took a similar step and allowed qualifying daytime-only Class III stations on the regional channels (and Class II daytime-only stations on two clear channels on which no U.S. clear channel stations operate) to operate at night using their existing antenna system with a maximum power of 0.5 kW, reduced as necessary to avoid interference to existing full-time stations. Stations authorized a power of at least 0.25 kW (or equivalent) were reclassified as unlimited-time Class II or Class III stations.[7] Others receiving lesser powers were reclassified as Class II-S or Class III-S stations[8] and were exempted from the principal city signal requirement. The Commission also exempted the new

Class II-S and Class III-S stations from the requirement that unlimited-time stations operate two- thirds of the hours between 6:00 p.m. and midnight each day of the week except Sunday.

7. These various Commission actions have substantially relieved the difficulties faced by daytime-only stations and their listeners, but as discussed below, we believe that there may be additional steps that can be taken to enable these former daytime-only stations to better serve their communities.[9]

DISCUSSION

Enhanced Nighttime Operation

8. In our actions permitting daytime-only stations to operate at night, the power levels authorized were calculated based on the same antenna system that the station used to provide its daytime (or, if applicable, its critical hours) service. Since these antenna systems had been designed with only daytime protection in mind, in many cases they were not capable of providing effective nighttime service. Many in this group were restricted to low powers from sites at some distance from the population to be served. This led some to decide not to use the authorization because the station's daytime site was not close enough to the community of license to permit it to be served with the authorized nighttime power and existing antenna pattern.

9. Although a Class II-S or III-S station was permitted to seek an increase in power, it had to propose an increase to at least the minimum power level. For some affected stations, we have found that such an increase is not possible at all for interference reasons; for others, it can be accomplished only at a prohibitive cost by installing highly directionalized antennas. Moreover, because of the low power initially authorized, some stations have chosen not to take advantage of their authorizations. In other cases, stations that do operate at night are unable to obtain the coverage they desire. No relief is available unless the station is able to propose an increase to at least the minimum power level. In many cases, this situation would change if the stations were able to establish a separate nighttime antenna system, either at the current site or elsewhere, from which the desired service could be provided without having to meet the minimum power requirement. It appears as if both the station and the public could benefit if the station had this latitude in selecting a site and antenna system responsive to its needs.

10. Continuing to restrict power increases to only those stations able to achieve minimum power may well be contrary to the public interest because such action could have the practical effect of preventing many Class II-S or III-S stations from upgrading their facilities at all. Stations able to increase power to the specified minimum level already have good reasons to do so, not only by virtue of the increase in coverage it makes possible but through the interference protection that they will obtain if they reach the level of minimum power. For stations not in this fortunate position, there is no current relief available. Even if these stations are unable to reach the minimum power level, we question whether the public is served by denying them the opportunity to improve their facilities and enhance their coverage. We recognize that permitting stations to apply for lesser power increases may diminish somewhat the incentive to reach minimum power. Our experience indicates, however, that it has been practical limitations such as financial or technical considerations that have kept many Class II-S and III-S licensees from operating with minimum power. Because these licensees are thus unlikely to reach minimum power in any case, there appears to be no basis for refusing to allow such stations the opportunity to provide increased service, albeit at less than minimum power.

11. For these r asons, we propose to allow Class II-S and III-S stations to establish separate nighttime operations, utilizing either their daytime operating site or another site, at power levels below the 0.25 kW minimum.[10] This proposal can offer several advantages. It would permit the licensee to consider a wide range of choices of how best to operate at night. The licensee could install a directional antenna designed specifically for nighttime operation, either at its current site or elsewhere. It could operate non-directionally from another site closer to the community of license or it could increase power, albeit not to the minimum power level. Even if the power were not increased or in fact was marginally reduced, coverage still could be improved in the very areas where it may most be needed, thus improving service to the public.[11] In addition, this approach could also offer the licensee the opportunity to use a simple nondirectional antenna array from its existing site or from another site that would enable the licensee to provide satisfactory nighttime service and thus compete more effectively in its market.[12]

12. It is important to take into account the administrative impact that adoption of this proposal might entail. To lessen any such impact, it may be possible to simplify or streamline the application process. One possibility is to define all such proposals as minor change applications even if a power increase is involved, thus eliminating the public notice requirements and reducing processing time. Comment on this and other possible approaches to lessening the administrative impact is invited.

13. Finally, we wish to make an important observation with respect to processing procedures applicable to Class II-S and III-S licensees filing applications for modifications of facilities. Initially, the Commission calculated the permissible powers and issued the appropriate nighttime authorizations. The calculations were based upon the daytime or critical hours antenna system. In the past, AM licensees seeking a change in authorization for their daytime facilities did not recognize the need to file for any corresponding change this necessitated in their nighttime facilities. In the future, however, it will be necessary for Class II-S and III-S licensees seeking authorization for modifications to their daytime facilities that would require any change to their nighttime operations to include information specifying the requisite changes to nighttime operations in their application. We note that, in the context of this proceeding, if Class II-S or III-S licensees use separate facilities for daytime and nighttime operations, changes in daytime operations will not necessarily in such cases affect nighttime operation. In such cases, this additional information would not be required.

Relaxation of Power Minimum

14. In addition, some full-time stations have expressed an interest in operating at lower nighttime powers but are currently barred from doing so by the minimum power and city coverage requirements. We seek comments upon permitting such a voluntary power reduction. Allowing stations to reduce power to a level below the current

minimum could provide licensees with additional latitude in which to tailor their facilities to respond to existing market conditions. Greater flexibility could result in services better attuned to meeting the needs of the station's audience. Should we proceed in this fashion, we intend to maintain the interference constraints applicable to such stations. We propose, however, that a station reducing its power to a level below the established minimum would be reclassified as Class II-S or Class III-S and would lose its right to interference protection that is accorded to stations with at least minimum facilities. It is our intention at this time to retain the city coverage and minimum operating schedule requirements for stations employing voluntary power reductions. We seek comment upon whether it would be appropriate to exempt such stations from these requirements, as are existing Class II-S and III-S stations, or whether stations engaging in a voluntary power reduction below the minimum level should continue to be held to the city coverage or minimum operating schedule requirements.

ADMINISTRATIVE MATTERS

15. Authority for the rule changes upon which comments are invited is contained in Sections 4(i), 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 307.

16. Pursuant to the applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **December 27, 1988,** and reply comments on or before **January 11, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive personal copies of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

17. For the purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice stating that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever comes first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence for the resolution of issues in the proceeding. Section 1.1203.

18. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1201(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously- filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

19. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is attached as Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule Making*, including the Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, Pub.L. 96- 354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.*,(1981).

20. The proposal herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements, and will not increase burden hours imposed upon the public.

21. For further information on this proceeding, contact Diane L. Hofbauer, (202) 254-3394.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

I. Reason for Action:

In this proceeding, we seek public comment upon a proposal to allow Class II-S and Class III-S AM broadcast stations to establish separate nighttime operations designed to better serve local needs without requiring them to comply with minimum power requirements.

II. Objective:

This proposal is intended to permit an expansion of the nighttime operations of Class II-S and III-S AM stations so that they may better serve the public.

III. Legal Basis:

Sections 4(i), 303, and 307 of the Communications Act, as amended, 47 U.S.C. §§154(i), 303 and 307.

IV. Description, Potential Impact, and Number of Small Entities Affected:

There are more than 1500 AM broadcast stations that could benefit from this proposal in the United States. An estimated 50 AM licensees per year are expected to utilize the options proposed in this Notice of Proposed Rule Making. This proposal is expected to increase service to local communities with minimal additional, if any, expense to the licensee.

V. Reporting, Record Keeping, and Other Compliance Requirements :

There are no reporting, record keeping or other compliance requirements.

VI. Federal Rules that Overlap, Duplicate or Conflict with Proposal:

There is no overlap, duplication or conflict.

VII. Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objective:

This proposal is designed specifically to allow AM licensees to increase service with little or no impact on current operations.

FOOTNOTES

[1] Hours of Operation of Daytime-Only Stations, *First Report and Order* in BC Docket No. 82-538, 95 FCC 2d 1032 (1983).

[2] A discussion of this situation is contained in the *First* Report and Order in BC Docket No. 82-538, supra, at Paragraphs 51-52.

[3] See Report and Order adopted April 26, 1985 in MM Docket No. 84-281, FCC 85-244, 50 Fed. Reg. 24515, June 11, 1985, as modified on reconsideration, Memorandum Opinion and Order, adopted February 3, 1986, FCC 86-79, 103 FCC 2d 532 (1986).

[4] Critical hours are the first two hours after sunrise and the last two hours before sunset during which there is a potential for daytime skywave interference.

[5] For the sake of convenience, we refer to a minimum power of 0.25 kW. Operating with this power and minimum antenna efficiency, a station has an RMS of 141 mV/m at one kilometer. Thus, any operation with an RMS of 141 mV/m or greater meets the minimum even though the power may be below 0.25 kW. This occurs when an antenna system of greater efficiency is employed.

[6] The principle reason for imposition of minimum power requirements is the recognition that operations with a power below this level are likely to cause a disproportionate degree of preclusion in exchange for the service that will be provided. The same concerns, however, may not hold true in a mature medium like AM where the areas of such preclusion are likely to have been precluded already.

[7] In connection with this action, the Commission reduced the generally applicable minimum power for nighttime operation of Class III stations on regional channels to 0.25 kW.

[8] Class III-S stations are full-time stations on regional channels operating below minimum power at night. Class II-S stations operate on a like basis on clear channels.

[9] When the Commission began its actions, there were more than 2,400 authorized daytime-only stations representing about half of the total of AM stations. As a result of the recent actions, more than three quarters of these stations have been authorized to operate at night. As discussed below, not all of these stations have chosen to implement nighttime operation.

[10] When the Commission authorized nighttime operation with less than the minimum power, it recognized that it would be unrealistic to expect the station to provide the city coverage required at night. Although adoption of the proposal now before us could lead to some increase in nighttime city coverage, it appears that it likewise would serve little purpose to apply the principal city signal requirement to the nighttime operation of these stations. The same is true for the minimum operating schedule requirement. The current rules exempt Class II-S and III-S stations from both requirements, and we propose to continue these exemptions. Exemption from the principal city signal requirement, however, creates the possibility that a station could establish nighttime service in a new community at the expense of service to its community of license. This outcome could be avoided if we required nighttime service levels within the community of license to be at least as good as the service levels originally authorized (i.e. that originally authorized by the Commission for nighttime operation using daytime facilities). We seek comment as to whether this or some similar requirement is necessary. Finally, we do not hereby contemplate any changes in any daytimer preferences that these Class II-S and III-S stations might enjoy.

[11] In making this proposal, we have no intention of authorizing facilities that would be predicted to create interference to full-time stations under the criteria established in §73.37(a) of our Rules.

[12] Although problems with re-radiation and with antenna efficiency have in the past been associated with the use of rooftop antennas for nighttime operations, we are willing to consider whether utilization of rooftop antennas could provide a feasible alternative. We invite comment on this alternative and may consider whether to allow use of roof-top antennas should the commenters demonstrate that rooftop antennas are feasible and could be utilized without causing undue re-radiation concerns.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-511

In the Matter of

Review of the Methods for Calculating
Nighttime Protection for Stations
in the AM Broadcast Service

NOTICE OF PROPOSED RULE MAKING

Adopted: October 13, 1988; Released: November 4, 1988

By the Commission:

INTRODUCTION

1. The Commission is initiating this proceeding to propose revision of its Rules relating to procedures for calculating nighttime protection level to be afforded stations in the AM broadcast service. In particular, the Commission is considering modifying its Rules that relate to the calculation of nighttime RSS (root-sum-square) skywave interference levels to the protected groundwave contours of Class II and Class III AM broadcast stations and the skywave service contours of Class I clear channel stations. Consideration also is given to including adjacent channel skywave signals in such calculations.

2. This proceeding is an outgrowth of the *Notice of Inquiry* (*Inquiry)* in MM Docket No. 87-267, which initiated a comprehensive review of the Commission's AM broadcast assignment criteria and related matters.[1] Its goal was to identify any needed changes to the Commission's Rules which would permit AM stations to improve their service to the public and enhance their ability to compete in the market place.

3. Among the issues discussed in the *Inquiry* was the most appropriate method of calculating the RSS skywave interference to the nighttime groundwave service of Class II and Class III AM stations.[2] Alternative methods for modifying the current calculation procedure prescribed in the FCC Rules were discussed, along with the possible need for including the effects of adjacent channel skywave signals in the calculations. Subsequent consideration of this matter has led us to tentatively conclude that a similar calculation procedure may be useful in determining interference to the skywave service of Class I stations. Accordingly, this possibility will be examined herein.

4. A substantial number of comments addressing nighttime interference issues and procedures were received in response to the *Inquiry*. These comments support further consideration of the improved methods for calculating nighttime interference discussed in the *Inquiry*. Accordingly, we believe that the time is now ripe for considering changes to the procedures for calculating nighttime interference as proposed below. [3] Before addressing these proposed changes, however, the following background information is provided.

BACKGROUND

5. The AM service is the most technically complex broadcast service to administer. This is due largely to the propagation conditions that exist in the AM broadcasting band. In contrast to other frequency bands where broadcast services are authorized, the propagation characteristics of the AM band vary with the time of day. During daytime hours, service is provided predominantly by groundwave signals that travel along the surface of the earth, and which are affected by the soil conductivity along the propagation path.

6. During nighttime hours, however, skywave signals from an AM station may be reflected from the ionosphere[4] and can be propagated many hundreds of miles from the transmitter location. This nighttime propagation has both positive and negative implications. On the one hand, nighttime skywave signals can be employed to provide service many hundreds of miles from the transmitter. On the other hand, such enhanced signal propagation increases the probability of interference among stations hundreds of miles apart. Consequently, co-channel stations that could be located reasonably close to one another without interference during daytime hours could cause significant mutual interference during nighttime hours.

7. Interference during nighttime hours is further exacerbated by the fact that skywave interference can be caused by several co-channel and adjacent channel AM stations simultaneously. For this reason, the Commission adopted rules several decades ago to deal with the effect of cumulative interference to the service of Class II and Class III stations. However, as will be discussed below, there is reason to believe that the current Rules do not adequately deal with the effect of cumulative interference received from multiple interfering AM signals.

8. Class I and Class II stations operate on clear channels. Class I stations provide extensive primary (groundwave) service during the day and night, as well as secondary skywave service during nighttime hours generally extending out to 750 miles or more. Class II stations normally render primary service only, the area of which depends on the station location, power, and frequency. Class III stations operate on regional channels and provide primary service to larger cities and the surrounding rural areas.

9. Requisite protection to existing nighttime service of Class II and Class III stations is calculated in accordance with §73.182(l) of the Commission's Rules, which provides that the basis of protection to an existing station is the RSS (root-sum-square) value of interference caused to that station. In order to limit the number of interfering signals that must be taken into account, a "50% exclusion method" is used in making the calculations. This method provides a procedure for determining at what point interfering signals can be disregarded. Thus, the RSS for a station is determined by considering interfering signals in order of decreasing magnitude, excluding those that are less than 50% of that obtained using the stronger signals.

10. In the case of U.S. Class I stations, protection is afforded to the nighttime 0.5 mV/m 50% skywave signal.[5] However, currently protection is calculated only on a "single signal" basis (i.e., each interfering signal is to be treated individually without considering the effect of other interfering signals). Thus, unlike the RSS procedure applied to Class II and Class III stations, no provision is currently made for considering the effect of multiple inter-

fering signals. Absence of such a provision is mitigated by the fact that, unlike the regional channels where many nighttime stations operate, the clear channels are used by far fewer nighttime stations.

DISCUSSION

Limitations associated with the current method of RSS interference calculation.

11. Calculating a station's RSS interference level using the 50% exclusion method cannot yield the true RSS value since the contributions of the weaker stations are excluded. Thus, its use can result in the gradual erosion of nighttime service as new nighttime operations are placed into service, or as existing stations modify their facilities to increase the signal strength in various directions. In fact, this method may allow each new nighttime operation to cause about 12% (approximately 1 dB) of additional interference to an existing nighttime station.

12. Additionally (as we pointed out in the *Inquiry*), there is a basic inconsistency in the application of the 50% exclusion method. For example, a new station can be placed on the air as long as its interference contribution to other stations is sufficiently low as to be ignored by the 50% exclusion method. However, an existing station whose interfering contribution to the same protected station is sufficiently strong to already require its inclusion in the protected station's calculated RSS value would not be permitted to increase interference by any amount, even though the resulting interference may be equal or less than that caused by a proposed new station.

13. The *Inquiry* discussed two alternative procedures that might be used instead of the current RSS method in order to alleviate its shortcomings. One was to eliminate the 50% exclusion method altogether and to apply an acceptable factor (some decibel or percentage increase) by which the RSS interference level at the protected contour of any station could be increased by another station. This procedure would have the advantage of consistent application to all stations whether they are already included in the RSS of an existing station or not. However, those filing comments generally did not favor this approach, because it would permit each station to cause some additional interference, and because of its potential for abuse (nothing was proposed that would prevent a particular station for filing for successive upgrades, each of which would comply with the new standard, the aggregate of which could substantially exceed it).

14. The other alternative proposed a reduction (such as 25%) in the exclusion reference, above which new interference contibutions would not be permitted. This procedure would not resolve the inconsistency discussed in the paragraph 12, above. Nevertheless, this proposal received the greatest amount of support, since it was seen as capable of providing a modest reduction in overall interference levels without eliminating all flexibility in facility design or modification.

15. The primary objectives in considering a change in the procedures for RSS calculations are to determine service and interference more accurately, and to limit the incremental increase of interference that may be caused to existing stations by new stations or changes in the facilities of existing stations. In doing so, we must take care that the imposition of rigid interference constraints does not restrict substantially the introduction of new AM service in areas lacking it or changes to existing existing facilities.[6] Some mechanism is needed to balance restrictions on the incremental increase of interference to existing stations while, at the same time, maintaining sufficient flexibility for new stations or modifications to existing stations to be effectuated in order to meet the service needs of the public and AM stations alike. In the past we believed that authorizing facilities that contributed interference levels less than half of that existing previously was a reasonable way to balance these conflicting concerns.

16. We are sensitive to the concerns of those who feared that replacing the 50% exclusion method with a method that would allow a station to increase interference to any other station by a given amount (e.g., 1 dB or 0.5 dB) could be subject to abuse. Such a method would need to include a procedure to preclude the filing of successive applications by a station, where each application raised the level of interference to other stations by the maximum amount permitted. Such a procedure may be difficult to enforce in actual practice, however, because of the administrative complexity of examining subsequently filed applications for consistency with the requirement.

17. We have, therefore, tentatively concluded that a modification of the current RSS calculation procedure prescribed in §73.182(l) of the Rules to change the 50% exclusion to a 25% exclusion would provide the best balance between limitations on new interference and flexibility in facility design. The 25% exclusion method that we are proposing would be applied in a manner similar to the current 50% exclusion method; that is, each contributing interfering signal would be ranked in descending order of magnitude and all interfering signals that are less than 25% of the RSS of preceding contributors would be disregarded in the calculation of the RSS.[7] Although we are proposing an exclusion level of 25%, we solicit comments on whether some other value would be more appropriate. We also solicit comment on whether the need for consistency and improved accuracy in the determination of interference levels warrants elimination of the approximate method of determining the nighttime service of Class IV stations given in the Note in Section 73.182(a)(4) of the Commission's Rules. Considering the refinement in the calculation methodolgy we are proposing herein, retention of such an approximate approach to interference computation may no longer be appropriate.

18. The 25% exclusion method would permit the RSS of an existing station to be increased by up to 3% (.26 dB) by a new co-channel station. We would note, however, that the RSS limits of existing Class II and Class III stations would increase when they are recalculated in the future because a greater number of existing interfering contributors would be included in the RSS calculation using the 25% exclusion method, as compared to the 50% exclusion method.

19. On a related matter, Section 73.182(m) of the Rules states, in effect, that objectionable interference from a station on the same channel shall be considered to exist to a station if the interfering field strength at the normally protected contour for the protected station (or the contour corresponding to the RSS for the protected station) from another station exceeds the value prescribed in Section 73.182(s), or the RSS divided by 20, whichever is greater. We also solicit comments as to whether it is still appropriate to maintain the provision of Section 73.182(m) in the Rules.

Adjacent channel skywave interference

20. Another issue concerning calculation methodologies relates to adjacent channel skywave interference. Section 73.182(n) of the FCC Rules limits the amount of interference that is permitted at the normally protected contour of a station resulting from the groundwave signal of an adjacent channel interfering station. However, no provision currently is made for also considering the effect of adjacent channel skywave interference. Comments filed in response to the *Inquiry* indicate that adjacent channel skywave signals can cause significant interference.

21. The *Inquiry* discussed two possible alternative procedures for dealing with the effects of adjacent channel skywave interference. One alternative discussed would be to amend the Rules to include co-channel and adjacent channel skywave signals in a single RSS calculation with appropriate weighting to account for the adjacent channel protection ratio. The other alternative discussed would be to require inclusion of adjacent channel skywave signals in the calculation of the adjacent channel groundwave RSS in the traditional manner prescribed in §73.182(n) of the Commission's Rules, in which the adjacent channel RSS level is computed normally, then checked to determine that it does not exceed the specified adjacent channel protection.

22. While the subject of adjacent channel interference is not well developed in the comments, the majority of commenters nevertheless expressed strong convictions that the current levels of interference in the AM broadcasting service border are nearly intolerable. They assert that over the years, there has been a continuing increase in interference levels, along with corresponding erosion of service areas. It is argued that this has perpetuated a steady decline in the AM audience because of public dissatisfaction with the level of interference to received programs. The comments are unanimous in expressing the opinion that not only should no further increase in interference be permitted under any circumstances, but steps should be taken to reduce current levels. Accordingly, the Commission is being strongly urged to direct its immediate attention to the amendment of §73.182, so that it more completely and accurately addresses actual signal and interference levels.

23. Encouraged by this general mandate to amend §73.182 to be more responsive to the foregoing concerns, we are proposing to amend paragraph (n) to include skywave signals on first adjacent channels along with co-channel skywave signals in the calculation of a station's RSS interference level.[8] Adjacent channel skywave signals would be weighted with an appropriate first adjacent channel protection ratio in the calculation procedure.[9] We further propose that the 25% exclusion method, proposed above, be applied to the weighted first adjacent channel skywave signals in the same manner as for co- channel interfering signals. Thus, a proposed new station, or modification to the facilities of an existing station, would not be permitted to increase the RSS level of any station within 10 kHz of the frequency of the proposed facility. We do not believe that it is necessary to consider the effect of skywave signals on second or third adjacent channels[10] because of the skywave field strength that would be required, after weighting with the applicable protection ratio, before such interference would become significant.[11]

Protection of nighttime service of Class I stations

24. We believe we should also consider at this time what changes, if any, may be appropriate in the protection afforded the skywave service of Class I stations. As we pointed out in paragraph 10, protection to the 0.5 mV/m 50% skywave signal of Class I stations currently is calculated by treating each interfering signal individually without considering the effect of other interfering signals. The effect of multiple interfering signals was believed to be mitigated by the relatively limited number and geographic distribution of co-channel Class II stations on any given clear channel frequency.[12] However, inasmuch as an important objective of this proceeding is the consistent application of improved interference prediction criteria to current and future broadcast facilities, we believe the proposed RSS computational method should be extended to cases where multiple interfering signals may affect the skywave service of Class I stations.[13]

25. In order to limit the effect of such cumulative interference, we are proposing to require that protection to a Class I station be determined by calculating the RSS at the 0.5 mV/m skywave or groundwave contour, whichever extends farther along each pertinent radial. Proposed new nighttime operations or modifications to existing facilities would be required to protect either the calculated RSS at any point on the protected contour or 0.5 mV/m, whichever is greater.[14]

26. There is presently no provision in the Commission's Rules to limit interference to the skywave service areas of Class I stations from adjacent channel skywave interference. Here also, the Commission is concerned that an increase in the number of nighttime operations on channels adjacent to clear channels could result in additional interference to Class I stations. We are, therefore, proposing to include skywave signals on first adjacent channel frequencies in the RSS calculations performed at the protected contour.

27. A final issue that must be resolved regarding the calculation of the RSS at the nighttime protected contour of Class I stations is the point at which interfering skywave signals are not included in the RSS calculation. Because we are proposing use of the 25% exclusion method for Class II and Class III protection, we believe that for purposes of consistency, Class I stations should be treated similarly. Nevertheless, there may be circumstances which warrant consideration of some other value. For example, the RSS calculation for Class II and Class III stations is related to protection of primary (groundwave) service, whereas the RSS calculation for Class I stations would be primarily related to secondary (skywave) service. The secondary skywave service of Class I stations may not need be protected to the same degree as primary service because skywave service does not have the same degree of reliability as groundwave service, due to the widely varying characteristics of skywave propagation. Therefore, while we are proposing use of the 25% exclusion method when calculating the RSS for Class I stations, we recognize that some tradeoff between the quality and quantity of service may suggest some other value as being more appropriate. Accordingly, we encourage interested parties to give careful consideration to this issue.

OTHER MATTERS

28. We believe we should treat the signals of stations in Canada and in Mexico as we would domestic stations in terms of their contribution to the calculation of co-channel and adjacent channel interference as proposed herein, to the extent such action would not conflict with current international agreements. Thus, until any change in the international agreements are effected, foreign facility proposals will continue to be evaluated as to their impact on U.S. stations pursuant to the 50% exclusion method and they will not be questioned on the basis of their adjacent channel skywave interference potential. Moreover, protection to foreign assignments will continue to be afforded in accordance with applicable international agreements. However, we propose to treat such foreign stations as we would domestic stations in terms of protection to domestic facilities.

29. Several parties commenting in response to the *Inquiry* were concerned about the impact that use of new calculation procedures may have on current AM broadcast service. For instance, although endorsing the use of more accurate procedures, several commenters urged the Commission not to implement their use until other AM assignment criteria were fully considered in appropriate rule makings. ABES and CBS, for example, are supportive of the more accurate procedures, adding that a rule making proceeding on this subject should be instituted. Such a proceeding, according to ABES, would permit a more detailed evaluation of its technical aspects as well as the potential impact on existing AM broadcast service such as changes in interference levels to existing stations, issues related to the processing of applications, and the potential for added administrative burdens.

30. We are cognizant of the relationship between the calculation procedures which we are considering in this *Notice* and other assignment criteria that may be considered in future rule making proceedings. We do not believe, however, that this fact should restrict us from proceeding with rule making at this time in order to develop a better record on this issue. Such a record will guide the Commission on appropriate actions which ultimately should be taken. We believe, however, that there may be practical reasons for considering a delay in implementing new calculation procedures, if adopted, until consideration of other possible changes to interrelated technical assignment criteria is concluded. Rather than implementing various changes to the technical assignment criteria in a "piece meal" fashion, there may be merit in considering implementing simultaneously all the interrelated changes that may ultimately be adopted. This approach could minimize administrative burdens for the Commission, as well as uncertainties within the broadcast industry. Accordingly, we seek comment on the advisability of such an approach.

31. It would not be our intent to require any modifications of existing facilities as a result of the changes proposed in this Notice. Nor would we require modifications to applications pending at the time any changes proposed herein are implemented.

ADMINISTRATIVE MATTERS

32. Authority for the rule changes on which comments are invited is contained in Sections 4(i) and 303(f) of the Communications Act of 1934, as amended.

33. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **December 27, 1988** and reply comments on or before **January 11, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference (Rm. 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

34. For the purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

35. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1201(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously- filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

36. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is attached as Appendix A. Written public com-

ments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule Making*, including the Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. 96- 354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.*, (1981).

37. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and has been found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

38. For further information on this proceeding, contact Steven Selwyn, Mass Media Bureau, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

I. Reason for Action:

In this proceeding, we seek public comment on the desirability of modifying existing procedures for calculating nighttime interference to AM stations resulting from multiple interfering signals. Changes being proposed pertain to improvements to the FCC's Rules related to the the RSS (root-mean- square) calculation of interference for Class II and Class III stations. Consideration is also given to calculation of interference to the skywave service area of Class I clear channel stations by the RSS method. Additionally, this *Notice* gives consideration to including the effect of adjacent channel skywave signals in the RSS calculation.

II. Objective:

The proposed changes are intended to modify provisions of the Rules which have been found to be inaccurate. This is in keeping with the Commission's efforts to update and improve the standards upon which the AM service is based so as to reflect the actual representation of service and interference.

III. Legal Basis:

Sections 4(i), 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 303, and 307.

IV. Description, Potential Impact and Number of Small Entities Affected:

There are approximately 5000 AM broadcast stations in the United States. None of these stations should be affected directly by this proposal since the changes proposed only relate to procedures for calculating interference to AM stations resulting from multiple interfering signals from other AM stations. We expect no negative impact to these stations, small entities or large, as we are not mandating any new requirements or showings. Actual interference is not expected to increase as a result of the specific changes proposed in this *Notice*. Indeed, the objective of the changes being proposed is to minimize new interference that could result in the future from new AM stations or changes to the facilities of existing stations.

V. Reporting Record Keeping, and other Compliance requirements:

There is no additional impact.

VI. Federal Rules that Overlap, Duplicate or Conflict with These Rules :

There is no overlap, duplication, or conflict.

VII. Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objectives:

There are no significant alternatives available.

APPENDIX B

The overall RSS (root-sum-square) field strength due to two or more individual co-channel and first adjacent channel interference contributions would be calculated using the expression:

$$RSS = [(a_1E_1)^2 + (a_2E_2)^2 + \ldots (a_iE_i)^2] = 1/2$$

Where:

Ei is the field strength of the i'th interfering transmitter (in uV/m);

ai is the radio frequency protection ratio associated with the i'th interfering transmitter, expressed as a numerical ratio of field strengths.

We propose that the field strength of interfering signals be arranged in descending order of magnitude (adjusted for weighting factors) and the interfering contributions of signals that are less than 25% of the RSS resulting from stronger signals be disregarded in the RSS calculation.

In the case of Class II and Class III stations, the calculations would normally be made on a transmitter site to transmitter site basis (site-to- site). In the case of Class I stations, the RSS would be calculated at the 0.5 mV/m 50% skywave contour, or the 0.5 mV/m groundwave contour, whichever extends farther along the pertinent radial. The RSS calculations would be made at as many points along the contour as are necessary to obtain an accurate indication of predicted interference.

FOOTNOTES

[1] *See , Notice on Inquiry, Review of Technical Assignment Criteria for the AM Broadcast Service*, MM Docket No. 87-267, FCC 87-245, adopted July 16, 1987, released August 17, 1987, 2 FCC Rcd 5014 (1987), 52 Fed. Reg. 31975, August 24, 1987. The *Inquiry* was issued after review of the comments received in response to the Mass Media Bureau's *Report on the Status of the*

AM Broadcast Rules, RM-5532, (*Report*) released April 3, 1986. The *Report* discussed the status of AM broadcasting and addressed a large number of technical, legal, and policy issues.

[2] *See Inquiry*, para. 74-80.

[3] This proceeding will examine only those issues pertaining to procedures for calculating nighttime interference for Class I, Class II, and Class III stations. Where appropriate, the Commission will institute rule making proceedings to deal with the remaining issues addressed in the *Inquiry* and in public comments.

[4] The ionosphere is a region of the earth's atmosphere consisting of several layers subject to ionization. These layers are alphabetically designated and have varying effects on radio waves. Pertinent to the propagation of AM broadcast signals are three ionization layers (D, E, and F). The distance of these layers above the earth varies from approximately 50 km for the D-layer (nearest the earth) to approximately 300 km for the F-layer (farthest from the earth).

[5] *See* Section 73.182(a)(1)(i)(B).

[6] Commission experience has been that a substantial number of existing stations make changes to their facilities each year for a number of reasons. In some cases such changes are required because the station has lost its transmitter site and must move to a new location. More commonly, construction in the vicinity of the current antenna site causes the directional antenna pattern to experience adjustment difficulties, thereby requiring a new directional antenna pattern or a new antenna site. In other cases changes result due to refurbishing the antenna system or because the station needs to adjust its service area due to demographic changes that have occurred in its community of license.

[7] For purposes of protection, the RSS would not be considered to be increased when a new interfering signal is added which is less than 25% of the RSS value of interference from existing stations, and which at the same time is not greater than the smallest signal included in the RSS value of interference from existing stations. Moreover, it should be noted that the anomalies discussed in Section 73.182(1)(3),(4) and (5) would still need to be assessed.

[8] The formula that we are proposing for use in calculating the RSS of Class II and Class III stations is contained in Appendix B of this *Notice*. It is similar to the "power sum method" described in Report 945-1 in Volume X - Part 1, Recommendations and Reports of the CCIR (International Radio Consultative Committee).

[9] The current first adjacent channel ratio prescribed in §73.182(t) is 1:5 (desired to undesired). However, potential changes in co-channel and adjacent channel protection ratios are currently under consideration in MM Docket No. 87-267, and may be further addressed in a subsequent rule making proceeding.

[10] The proscriptions in Section 73.37(a), however, would continue to apply.

[11] For example, if an existing station has an RSS of 4 mV/m and a new station is proposed on a frequency which is a second adjacent channel to the existing station, 30 mV/m skywave field strength would have to be produced by the proposed station at the site of the existing station before the interfering contribution would have to be taken into account (this assumes that the applicable protection ratio is 1:30 (desired to undesired). This is a level of field strength that exceeds the radiation capabilities of stations licensed in the United States.

[12] In E. Weaks McKinney-Smith, 22 FCC 2d 211 (1957) the Commission ruled that in the case of groundwave protection it is incorrect to apply the single- signal method, and that multiple interferences to groundwave services should be taken into account.

[13] Because we have attempted to narrowly focus this proceeding on consideration of what we believe are improved methods of computing interference, it is not intended to be a forum for debating unresolved issues associated with any other ongoing proceeding. Thus, the question of whether Class II daytime-only stations should be allowed to operate on Class I clear channels at night (*see Report and Order, Unlimited-Time Operation by Existing Daytime-Only AM Stations, Discontinuance of Authorization of Additional Daytime-Only Stations; and Minimum Power of Class III Stations*, FCC 87-356, 2 FCC Rcd 7113 (1988), 52 Fed. Reg. 48268, December 21, 1987) is outside the scope of this proceeding.

[14] Where the protected contour (groundwave or skywave) extends across the border of the U.S. into another country, or over water, the field strength calculated along the border or the shoreline of the water becomes the protected contour. The permissible interfering signal would be the calculated field strength divided by the applicable co-channel or adjacent channel protection ratio, or the signal permitted by the RSS calculation using 25% exclusion, whichever is greater.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-236

In the Matter of

Amendment of Section 73.202(b), RM-5725
Table of Allotments,
FM Broadcast Stations.
(Carthage, Illinois)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: November 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 3115 (1988), issued in response to the petition of Bryan Broadcasting, Inc., (petitioner) licensee of Station WCAZ(FM), Carthage, Illinois, proposing the substitution of Channel 221B1 for Channel 221A, and modification of its Class A license accordingly. No comments were received from the petitioner or any other party.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allocated. It is the Commission's general policy to refrain from making allocations to a community absent an expression of interest. Therefore, since there has been no such interest here, we will dismiss the petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of Bryan Broadcasting Inc., requesting the upgrade of Station WCAZ(FM) at Carthage, Illinois to operate on Channel 221B1 IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-74

In the Matter of

Amendment of Section 73.202(b), RM-6063
Table of Allotments,
FM Broadcast Stations.
(Sheridan, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: November 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 1020 (1988), proposing the substitution of Channel 275C2 for Channel 272A at Sheridan, Arkansas, and modification of the license of Ainsley Communications, Corp. (petitioner) for FM Station KQLV(FM), Channel 272A, to specify operation on the higher class channel. Supporting comments were filed by the petitioner reiterating its intentions. No other comments were received.

2. As indicated in the *Notice*, Channel 275C2 can be allotted to Sheridan in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 17.8 kilometers (11.1 miles) west[1] of the community to avoid short-spacing to Station KFXE(FM) (Channel 222C1), Pine Bluff, Arkansas, and to Station KHOZ- FM, Channel 275C, Harrison, Arkansas.[2] Moreover, Station KHOZ-FM must be licensed at the site specified in its construction permit before the Sheridan upgrade can be effectuated.

3. On the basis of the above, the Commission believes the public interest would be served by substituting Channel 275C2 for Channel 272A at Sheridan, Arkansas, since it could provide a first wide coverage area FM service to the community. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station KQLV(FM) to specify operation on Channel 275C2 in lieu of Channel 272A at Sheridan, Arkansas.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 19, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Sheridan, Arkansas, as follows:

City	Channel No.
Sheridan, Arkansas	275C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Ainsley Communications, Corp. for Station KQLV(FM), IS MODIFIED, to specify operation on Channel 275C2 in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Reference coordinates at the restricted site for Channel 275C2 are 34-15-33 and 92-34-56.

[2] The 249 kilometer minimum distance separation required between C-C2 co- channels is met based upon the construction permit issued to Station KHOZ-FM at reference coordinates 36-26-11 and 93-14-43. However, the allotment of Channel 275C2 at Sheridan is conditioned upon Station KHOZ-FM receiving a license in accordance with its construction permit to relocate its site and modify its facilities to maintain Class C status (BPH-860707MT).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-518

In the Matter of

Amendment of Section 73.606(b), RM-6123
Table of Allotments,
TV Broadcast Stations.
(Yreka City, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 30, 1988; Released: November 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the petition for rule making filed on behalf of Junko and Bobby C. Shehan (petitioners), requesting the substitution of UHF Channel *35 for Channel *20+ at Yreka City, California, which is currently unoccupied and unapplied for.

2. Petitioners advise that they are the sole applicants for UHF television Channel 27 at Medford, Oregon (BPCT-871002KI). In support of their proposal, petitioners comment that their intended site[1] at Medford cannot meet the minimum distance separation requirements of Section 73.610 of the Commission's Rules with regard to the Yreka City allocation.[2] Therefore, petitioners urge the requested substitution of channels to permit the use of a superior site from which to serve Medford, Oregon, and the surrounding areas.

3. The Commission does not generally substitute a higher reserved UHF channel for a lower one to accommodate a commercial interest elsewhere, unless there is some special public interest justification to support an exception to our policy. Petitioner's proposal, which is intended to permit its use of a preferred antenna site for commercial use, is not a sufficient basis to warrant the requested substitution at Yreka City. Additionally, petitioner has not demonstrated that its preferred site is the only one available to accommodate its application. Therefore, petitioner's comments, to be filed herein, should demonstrate (1) the unavailability of other sites to accommodate its application for Channel 27 at Medford; and (2) how, and to what extent, the public interest will benefit from the requested substitution at Yreka City. Failure to adequately address those issues could result in a denial of the proposal.

4. A staff engineering analysis has determined that Channel *35 can be substituted for Channel *20+ at Yreka City in conformity with the minimum distance separation requirements specified in Section 73.610(b) and 73.698 of the Commission's Rules. [3]

5. In view of the above, the Commission considers it appropriate to seek comments on the proposal to amend to TV Table of Allotments, Section 73.606(b) of the Commission's Rules, as follows:

City	Channel No. Present	Proposed
Yreka City, California	*20+	*35

6. It should be noted that the Commission has recently imposed a freeze on television allotments or applications therefor, in certain metropolitan areas.[4] However, Yreka City is not one of the affected areas.

7. The Commission's authority to .nstitute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **December 27, 1988,** and reply comments on or before **January 11, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners', as follows:

Junko and Bobby C. Shehan
2032 Amsterdam Lane
Modesto, CA 95356

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection ; Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Reference coordinates of petitioner's application site are 42-17-54 and 122-44-59.

[2] Reference coordinates of Channel *20+ at Yreka City are 41-43-49 and 122-38-15.

[3] Reference coordinates utilized in this determination are 41-43-48 and 122-38-12.

[4] *See Notice of Inquiry,* 2 FCC Rcd 5125 (1987), and Order, 52 FR 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-519

In the Matter of

Amendment of Section 73.202(b), RM-6379
Table of Allotments,
FM Broadcast Stations.
(Beaumont and Big Bear Lake,
California)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: September 30, 1988; Released: November 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein a petition for rule making filed on behalf of Eastland Broadcasting Corp. (petitioner) seeking the allotment of Channel 269A to Beaumont, California, as its first local FM service. In order to accomplish its proposal in compliance with Section 73.207(b) of the Commission's Rules, petitioner advises that an additional change is required at Big Bear Lake, California. Specifically, petitioner seeks the substitution of Channel 231A for Channel 269A at Big Bear Lake, licensed to Mountain Broadcasting Company, Inc. for Station KTOT(FM), and the concomitant modification of its license. Additionally, Station KTOT(FM) would be required to relocate its transmitter to accommodate petitioner's proposal.

2. A staff engineering analysis reveals that Channel 269A can be allotted to Beaumont in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[1] Channel 231A can be substituted for Channel 269A at Big Bear Lake, provided the transmitter is restricted to an area at least 0.9 kilometers (0.6 miles) north[2] thereof, to avoid a short spacing to Station KFSD-FM, Channel 231B, San Diego, California. [3]

3. We have no indication from MBC that it consents to the changes proposed by petitioner. Absent such a commitment, Commission policy is to refrain from making an allotment which would require the involuntary relocation of a station's transmitting antenna. *See Claremore, OK*, 3 FCC Rcd 4037 (1988) and cases cited therein. The underlying rationale for this policy is the administrative difficulty in selecting and approving a new transmitter site for an existing station and directing the station to fund and construct those facilities. We have steadfastly observed this policy even if the transmitter relocation would further a public interest objective. Therefore, a forced relocation would require a compelling showing that the public interest benefits would be adequate to surmount the administrative burdens and consequent impact upon the affected station and its audience. *See Asheville, NC*, 36 RR 2d 810 (1976). Petitioner has provided no such showing. Rather, petitioner appears to premise its proposal on a belief that Station KTOT(FM) may be required by the U.S. Forest Service to relocate from its current site.

4. In consideration of the above, we shall seek comments from MBC to determine its relocation plans, if any. We shall also direct an *Order to Show Cause* to it, to determine why the license for Station KTOT(FM), Channel 269A, Big Bear Lake, California, should not be modified to specify operation on Channel 231A.

5. Whenever an existing licensee (or permittee) is ordered to switch frequencies in order to accommodate a new channel allotment, the benefitting party is required to reimburse the affected station for costs incurred. Petitioner believes it should not be required to reimburse MBC for the costs associated with the site move, if it is ultimately required to relocate the transmitter for Station KTOT(FM) by the U.S. Forest Service. However, as required by Commission policy, petitioner would be responsible for the reimbursement of costs related to the frequency change. Petitioner has stated its willingness to reimburse Station KTOT(FM) to that limited extent.

6. As both Beaumont and Big Bear Lake, California, are located within 320 kilometers (199 miles) of the United States-Mexico border, the Commission must obtain concurrence of the Mexican government in the proposal.

7. Accordingly, in order to provide Beaumont, California, with its first local FM service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Beaumont, California	–	269A
Big Bear Lake, California	269A	231A

8. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Mountain Broadcasting Company, Inc., licensee of Station KTOT(FM), Big Bear Lake, California, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 231A in lieu of Channel 269A.

9. Pursuant to Section 1.87 of the Commission's Rules, Mountain Broadcasting Company, Inc., may, not later than **December 27, 1988,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call upon Mountain Broadcasting Company, Inc. to furnish additional information. If Mountain Broadcasting Company, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Mountain Broadcasting Company, Inc. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND, a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following:

Mountain Broadcasting Company, Inc.
P. O. Box 2810
Big Bear Lake, CA 92315

11. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

12. Interested parties may file comments on or before **December 27, 1988,** and reply comments on or before **January 11, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

William E. Kennard, Esq.
Susan F. Heck, Esq.
Verner, Liipfert, Bernhard,
McPherson & Hand, Chartered
1660 L Street, NW
Suite 1000
Washington, D.C. 20036

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is

directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings ade in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Reference coordinates used in this determination are those of center city at 33-56-06 and 116-58-24.

[2] Reference coordinates used for proposed Channel 231A at Big Bear Lake are 34-16-10 and 116-50-46.

[3] Reference coordinates at the licensed site of Station KFSD-FM are 32-50-21 and 117-14-57.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-336

In the Matter of

Amendment of Section 73.202(b), RM-5672
Table of Allotments,
FM Broadcast Stations.
(North Windham, Maine)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: November 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5248 (1987), proposing the allotment of FM Channel 294A to North Windham, Maine, as that community's first FM broadcast service. The *Notice* was issued in response to a petition filed by Kollen Dodge (petitioner). Petitioner filed comments in support of the allotment.[1] Comments and reply comments were filed by Dirigo Communications, Inc. (Dirigo).

2. Dirigo is the licensee of Station WDCS(FM), Channel 292A, Scarborough, Maine, and has requested that the Commission impose a site restriction of 3.5 kilometers northwest on Channel 294A at North Windham. In support of its request, Dirigo states that it has operated Station WDCS(FM) at its current site for seven years and now finds it must vacate that site by June 15, 1988. Dirigo states that it was leasing space on its present tower and is currently exploring other possible antenna sites for Station WDCS(FM) to lease or construct a new tower. Dirigo submits that a site location is limited in an area severely restricted by Federal and local laws as part of the area is comprised of salt marshlands protected from development by Federal environmental laws and another part is zoned for residential use. Therefore, Dirigo requests the site restriction on Channel 294A at North Windham to ensure all options are available and also to retain as much flexibility as possible in relocating Station WDCS(FM). On July 13, 1988 Counsel for Dirigo Communications notified the Commission that it is no longer the licensee of Station WDCS, Scarborough, Maine. The assignment of license was approved by the Commission on February 26, 1988. Harvest Broadcasting Services, Consultant to the petitioner, also filed late comments, indicating Station WDCS was sold and that the new owners renegotiated a lease at the current site and that there is no longer a need for the additional site restriction as was requested by Dirigo Communications. Accordingly, Dirigo's earlier request is now moot.

3. Channel 294A can be allocated to North Windham, Maine, consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[2] We shall impose a site restriction 1.2 kilometers (.8 miles) west on the channel to prevent conflict with Station WQCB, Channel 293C, Brewer, Maine. Canadian concurrence has been obtained since North Windham is located within 320 kilometer (200 miles) of the common U.S.-Canadian border.

4. In view of the fact that the proposed allotment could provide a first FM broadcast service to North Windham, we believe the public interest would be served by a grant of the petitioner's request.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 19, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
North Windham, Maine	294A

6. The window period for filing applications will open on **December 20, 1988,** and close on **January 19, 1989.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In comments, petitioner restates her interest in the allotment of Channel 294A but identifies the proposed communityas Windham, not North Windham. We believe this is an oversight and shall accept the comments for interest in a channel at North Windham, Maine.

[2] The coordinates for Channel 294A at North Windham are 43-50-05 and 70-27-13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-381

In the Matter of

Amendment of Section 73.202(b),	RM-5352
Table of Allotments,	RM-5663
FM Broadcast Stations.	
(Folsom and Bogalusa, Louisiana)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 11, 1988; Released: November 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Folsom Community Broadcasters (petitioner), the Commission considers herein the *Notice of Proposed Rule Making*, 1 FCC Rcd 209 (1986), proposing the allotment of Channel 285A to Folsom, Louisiana, as that community's first local FM service. In response to the *Notice*, petitioner filed supporting comments reaffirming its interest in the allotment at Folsom. Timberlands Broadcasting Corporation (Timberlands)[2], submitted a counterproposal suggesting the allotment of Channel 285A to Bogalusa, Louisiana, as that community's first local FM service (RM-5663). [3] Petitioner responded to the counterproposal. Timberlands submitted late-filed comments and a supplement thereto.[4]

2. Timberlands contends that its proposal for Bogalusa is more deserving than the Folsom proposal based on population, Bogalusa having a population of 16,976 as opposed to Folsom's less than 600 persons. Timberlands alleges that Folsom is "little more than a crossroads." It acknowledges that Bogalusa is served by two AM stations, including its own Station WIKC. In addition, Timberlands states that an FM station, WBOX is located in the nearby community of Varnado, which operates Station WBOX(AM) in Bogalusa.

3. In reply comments, petitioner asserts that Folsom is a separate and distinct community of appreciable size which warrants a first transmission service, and submits a letter from the Mayor of Folsom urging an allotment to Folsom. Petitioner further states that Folsom is an incorporated municipality with a police department, its own taxing authority, elected officials, and is independently governed by a Board of Aldermen. Petitioner claims that its proposal would provide primary service to several sizeable and underserved communities surrounding Folsom, namely, Covington and Abita Springs, Louisiana.

4. The Commission has determined that both communities are deserving of receiving a first local FM service. We consider the proposals mutually exclusive since Folsom and Bogalusa are separated by less than the required mileage of 105 kilometers (65 miles) for co-channel Class A allotments. Therefore, we conducted a channel search to determine if an alternative channel was available for either community to resolve the conflict. However, our engineering analysis concluded that Channel 285A is the only available channel which can be allocated to either community. Thus, these proposals must be comparatively considered. We shall be guided by the allocation priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982):

(1) first full-time aural service;

(2) second full-time aural service;

(3) first local service; and

(4) other public interest matters.

[Co-equal weight given to priorities (2) and (3)]

5. Folsom (population 319)[5], is located in St. Tammany Parish (population 110,869). It has no local aural broadcast service. Bogalusa (population 16,976), located in Washington Parish (population 44,207). Bogalusa currently receives local aural service from two full-time AM Stations WBOX and WIKC, the latter of which is licensed to the proponent for Bogalusa.

6. Using the aforementioned priorities as our guidelines, we find that neither of the proposals would provide a first or second full-time service. Since Folsom is devoid of local service, whereas Bogalusa is currently served by two local services, Folsom is entitled to preference, under priority three. Thus, the priorities provide a clear choice for the allotment of Channel 285A to Folsom. We believe this to be in accordance with the mandate of Section 307(b) of the Communications Act, as amended, to provide a fair, efficient and equitable distribution of radio services.

7. After careful consideration of the information before us, we conclude that the public interest would be served by allotting Channel 285A to Folsom, as a first local FM service as well as first local aural broadcast service. Channel 285A can be allocated to Folsom in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.1 kilometers (6.3 miles) east of the community.[6] The site restriction is necessary in order to avoid short spacings to Station KSMI-FM, Channel 285A, Donaldson, Louisiana, and Station WZZB(FM), Channel 285A, Centreville, Mississippi.

8. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 19, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Folsom, Louisiana	285A

9. The window period for filing applications will open on **December 20, 1988,** and close on **January 19, 1989.**

10. IT IS FURTHER ORDERED, That the petition for rule making filed by Timberlands Broadcasting Corporation (RM-5663) requesting the allotment of Channel 285A to Bogalusa, Louisiana, IS DENIED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Bogalusa, Louisiana, has been added to the caption.

[2] Timberlands is the licensee of AM Station WIKC at Bogalusa, Louisiana.

[3] Public Notice was given for the counterproposal on December 23, 1986, Report No. 1634.

[4] Timberlands' late-filed comments were not accompanied by a request for their acceptance. However, we have accepted the late-filed comments in order to permit Timberlands to express its intention to apply for the channel, if allotted to Bogalusa.

[5] Population figures for Folsom, Louisiana, are listed in the Rand McNally Commercial Atlas. All other figures are taken from the 1980 U.S. Census.

[6] The coordinates of the proposed site are 30-38-24 and 90-04-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-454

In the Matter of

Amendment of Section 73.202(b), RM-6026
Table of Allotments,
FM Broadcast Stations.
(Gleneden Beach, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: November 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Hal D. Fowler (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6535 (1987), proposing the allotment of Channel 264C2 to Gleneden Beach, Oregon, as the community's first local FM service. Petitioner filed coments supporting the allotment and reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. Gleneden Beach is neither incorporated nor listed in the 1980 U.S. Census. Therefore, petitioner was requested to furnish additional data to assist the Commission in determining whether Gleneden Beach is a community for allotment purposes. In response, petitioner reiterates the information provided in his initial request. In addition, he states that the Lincoln County Comprehensive Land Use Plan lists Gleneden Beach as a "community growth center" with local zoning which will permit both residential and business growth. According to petitioner, the population of Gleneden Beach, including vacation homes, is approximately 2,832, as of July 1987. He submits that this figure swells to 10,000 to 15,000 during peak tourist periods. We are also told that the 5 state parks in the area, which includes Gleneden Beach Wayside, receive in excess of one million visitors per year. Petitioner states that there are three distinct commercial areas in Gleneden Beach which house a variety of individual stores specializing in such items as mens and womens apparel, books, plants, candy, athletic supplies and groceries. In addition, there are several medical and dental offices located in Gleneden Beach as well as three churches. Government services are provided by the Gleneden Beach Volunteer Fire Department, the Gleneden Beach Post Office and the Gleneden Beach, Kerrville, Lincoln Beach Water Improvement District and Salishan Sewer District. Petitioner also states that the Lions Club and Rotary Club, which attract members from all over the area, hold their meetings in Gleneden Beach.

3. Based upon petitioner's showing, we find that Gleneden Beach is a community for allotment purposes and that the public interest would be served by allotting Channel 264C2 there since it could provide the community with its first local FM service. Channel 264C2 can be allotted to Gleneden Beach in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 19, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Gleneden Beach, Oregon	264C2

5. The window period for filing applications will open on **December 20, 1988,** and close on **January 19, 1989.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 44-52-53 and West Longitude 124-01-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72
CC Docket No. 80-286
CC Docket No. 86-297

In the Matter of

MTS and WATS Market Structure

Amendment of Part 67 (New Part 36)
of the Commission's Rules and
Establishment of a Federal-State
Joint Board

ORDER

Adopted: October 21, 1988; Released: October 24, 1988

By the Chief, Common Carrier Bureau:

1. On September 9, 1988, the BellSouth Telephone Companies, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (BellSouth), filed a petition for a waiver of the requirement that local exchange carriers (LECs) file revised access tariffs with a January 1, 1989, effective date to implement certain jurisdictional separations changes. The *Reconsideration Order* establishing this requirement[1] reversed an earlier determination by the Commission that LECs must count intermediate terminations in allocating Category 4.23 Central Office Equipment (COE) costs.[2] The Commission ruled that, pending the Joint Board's further inquiry into cost assignment procedures for Category 4.23 COE, LECs may not include intermediate terminations in allocating Category 4.23 COE costs. [3] The *Reconsideration Order* directed the LECs to file revised access charge tariff provisions reflecting the revenue requirement impact of this change, to be effective on January 1, 1989.[4] BellSouth seeks a waiver of these requirements[5] until the new filing date for its 1989 annual access tariff filing. In addition, BellSouth urges that such waivers be granted to similarly situated LECs.[6]

2. BellSouth contends that LECs and the Commission will be unnecessarily burdened by having two separate filing dates for the termination count revisions and the 1989 annual access filings. LECs, BellSouth continues, will be required to prepare two separate access filings and the Commission will be obligated to conduct two separate proceedings, although both filings can be easily consolidated into one administratively convenient procedure.[7] Additionally, BellSouth argues that LECs would be required to prepare their 1989 annual access filings on the assumption that the rates filed to comply with the *Reconsideration Order*, to become effective on January 1, 1989, would also become effective as scheduled. If the Commission should require changes in the termination count revisions filing, petitioner observes, the 1989 annual access filings could be unnecessarily complicated by the required changes.[8] Finally, BellSouth contends that the separate filing dates are not in the public interest because if the effective dates of the filings do not coincide, access customers may be subjected to multiple rate changes within a short period of time.[9]

3. Southern New England Telephone Company (SNET) filed comments on September 22, 1988, in support of BellSouth's petition.[10] SNET maintains that granting BellSouth's petition would be consistent with the Commission's decision in CC Docket No. 88-326 to consolidate several filings into one that would become effective on April 1, 1989.[11] Noting that the consolidation would ease administrative burdens associated with multiple filings, the Commission Order in CC Docket No. 88-326 decided that LECs should not be required to file three major revisions within a short period of time.[12] Therefore, SNET concludes, we should grant BellSouth's petition on the same grounds.

4. The Common Carrier Bureau has reviewed BellSouth's request and we conclude that the public interest will be served by waiving or suspending certain of the requirements set forth in the *Reconsideration Order*.

5. At the time the *Reconsideration Order* was originally adopted, the Part 69 access charge rules required an annual access charge filing with an effective date of January 1, 1989. Furthermore, the *Reconsideration Order* required that carriers reinstate former Part 67 separations procedures for the Other Billing and Collection subcategory effective January 1, 1989.

6. The effective date for the 1989 annual access filing was subsequently postponed until April 1, 1989.[13] Hence, granting this waiver so that the two tariff effective dates are simultaneous once again would be consistent with the Commission's actions in the *Reconsideration Order*. We have also concluded that similar waivers should be granted to any LECs wishing to consolidate the two tariff filings at issue. Therefore, all parties required to file tariffs reflecting termination count revisions under the *Reconsideration Order*, may do so as part of their annual access tariff filings scheduled to take effect April 1, 1989. The same considerations warrant suspending or waiving the *Reconsideration Order* requirement that carriers reinstate former Part 67 separations procedures for the Other Billing and Collection subcategory effective January 1, 1989. Carriers must file access tariffs to reflect that Commission action to become effective April 1, 1989.

7. Accordingly, IT IS ORDERED that the petition for waiver of the above-described requirements established by the Commission in the *Reconsideration Order* in CC Docket Nos. 78-72, 80-286, and 86-297, filed by the BellSouth Telephone Companies, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] MTS and WATS Market Structure, Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket Nos. 78-72, 80-286, and 86-297, Order on Reconsideration and Supplemental Notice of Proposed Rule Making (FCC 88-216), released Aug. 8, 1988 (*Reconsideration Order*).

[2] *See* Amendment of Part 67 of the Commission's Rules and Establishment of Joint Board, CC Docket No. 80-286, 2 FCC Rcd 2551, 2566 (1987); *see also* 47 C.F.R. § 36.126(e)(3).

[3] *See Reconsideration Order* at paras. 13-16.

[4] *Id.* at para. 14.

[5] BellSouth requests a waiver of (1) the effective date of the requirement that LECs may not include intermediate terminations, and (2) the requirement that LECs file access tariff revisions reflecting the revenue requirement impact of the termination count change.

[6] BellSouth Petition at 2.

[7] *Id.* at 3.

[8] *Id.*

[9] *Id.*

[10] Comments in support also were filed by the Ameritech Operating Companies and the Pacific Companies on September 19, 1988 and September 29, 1988, respectively. No pleadings were filed in opposition to the BellSouth petition. Also, a similar petition for waiver was filed by the Bell Atlantic Telephone Companies on October 7, 1988.

[11] *See* Access Tariff Filing Schedules, Report and Order, CC Docket No. 88-326, FCC 88-283, released Sept. 14, 1988.

[12] *Id.*

[13] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ANR PIPELINE COMPANY
Complainant,

v. File No. E-87-44

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: October 25, 1988; Released: November 4, 1988

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a Joint Motion filed on October 14, 1988, by ANR Pipeline Company (ANR) and American Telephone and Telegraph Company (AT&T), requesting that we dismiss with prejudice the above-captioned proceeding and authorize the parties' agreement to settle all issues raised in the matter. For the reasons set forth below, the Joint Motion is granted.

2. This proceeding was initiated by a formal complaint filed by ANR against AT&T on March 9, 1987, alleging that AT&T's rates for 56 kilobits per second (kbps) Data Digital Service (DDS) were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). AT&T denied such allegations and moved to dismiss the complaint. On April 13, 1988, the Common Carrier Bureau (Bureau) released an order in the proceeding in which it granted AT&T's motion to dismiss in part and denied it in part. *Aetna Life Insurance Company et al. v. AT & T*, DA-88-462 (released April 13, 1988). On May 16, 1988, ANR filed an Application for Review of the Bureau's order. Subsequently, the parties entered into settlement negotiations with the cooperation of the Enforcement Division. As a result of these negotiations, the parties reached a settlement that resolves all matters in controversy.

3. ANR and AT&T represent that their agreement resolves all claims alleged in the complaint in a manner acceptable to both parties. The parties state that grant of their joint motion will terminate the proceeding in a manner satisfactory to both, and conserve the time and resources of the parties and the Commission.

4. On the basis of the statements contained in the parties' motion, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Authorize Settlement and Dismiss Complaint filed by ANR Pipeline Company and American Telephone and Telegraph Company IS GRANTED.

6. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 4, 1988

NYNEX FILES PETITION FOR WAIVER OF SECTION 36.380 OF THE COMMISSION'S RULES

PUBLIC COMMENT INVITED

On October 14, 1988, New England Telephone and Telegraph Company and New York Telephone Company (NYNEX) filed a Petition for Waiver of Section 36.380 of the Commission's Rules. Section 36.380 reinstates former Part 67 separations procedures for the Other Billing and Collecting Expense subcategory of Revenue Accounting Expenses. These procedures are effective for an interim period pending the adoption by the Joint Board and the Commission of a permanent rule. *See Order on Reconsideration and Supplemental Notice of Proposed Rule Making, MTS and WATS Market Structure, Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board,* CC Docket Nos. 78-72, 80-286 and 86-297, 3 FCC Rcd 5518. In an Order released October 24, 1988, the Chief, Common Carrier Bureau postponed the effective date of these interim procedures from January 1, 1989, to April 1, 1989, to coincide with the 1989 annual access tariff filing. *See MTS and WATS Market Structure, Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board,* CC Docket Nos. 78-72, 80-286 and 86-297, DA 88-1687, released October 24, 1988. According to NYNEX the interim procedures are overly complicated and burdensome. NYNEX states that the interim procedures do not comport with the Commission's cost causation principles and would cause a12.4 million shift to the intrastate jurisdiction in their revenue requirement. NYNEX proposes instead to retain the present Part 36 Rules on Other Billing and Collecting Expenses pending the Commission's decision on a permanent rule.

Interested parties may file comments on the NYNEX petition no later than **December 1, 1988.** Replies should be filed by **December 16, 1988.** Comments and replies should refer to file number AAD 8-1931. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N. W., Room 812 and to International Transcription Services, Inc., 2100 M Street, N. W., Washington, D. C. 20036.

Copies of the NYNEX petition may be obtained from International Transcription Services, Inc. (202) 857-3800. A copy is also available for public inspection and copying in the Accounting and Audits Division public reference room, Room 812, 2000 L Street, N. W., Washington, D. C. 20554.

For further information contact Alicia Dunnigan, (202) 634-1861.

Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of the Applications of

COMMUNICATIONS SATELLITE CORPORATION — I-T-C-88-163

For Authority Under Section 504(c) of the International Maritime Satellite Telecommunications Act and Section 214 of the Communications Act of 1934, to Provide Maritime Services in the Pacific Ocean Region via the INMARSAT System Using a MARISAT Satellite and a MARISAT TT&C Facility Adapted for Communications Service

COMSAT GENERAL CORPORATION — CSG-88-086-ML

For Modification of its Santa Paula, California, Earth Station License (KB-34) to Provide Communications Services in Support of the Armed Forces Radio and Television Service (AFRTS) Network

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 28, 1988; Released: November 4, 1988

By the Chief, International Facilities Division:

1. The Bureau has before it applications filed on July 15, 1988 by Comsat General Corporation (Comsat General) and on July 21, 1988 by the Communications Satellite Corporation (Comsat) to provide maritime program audio service to ships in the Pacific Ocean Region (POR) via the INMARSAT System using the L-Band capacity of the MARISAT POR satellite currently leased by INMARSAT with the Comsat General MARISAT antenna at the Comsat Santa Paula, California, coast earth station site.[1] These applications were placed on public notice on July 27, 1988 and August 31, 1988 respectively. No comments were received. We grant the applications for the reasons set forth below.

BACKGROUND

2. According to the applicants, Comsat World Systems Division was chosen through a request for proposal (RFP) released by the Defense Communications Agency to provide transmission of a program audio channel(s) for the Armed Forces Radio and Television Service (AFRTS) Worldwide Radio Service. Comsat states it will receive a program audio channel from AFRTS and then broadcast it via the INMARSAT space segment using MARISAT satellites to ships at sea in the POR.

3. The applicants state that based on a decision of the INMARSAT Council, this service initially will be provided over the L-Band capacity of the MARISAT satellites which INMARSAT is leasing from Comsat General.[2] Comsat states that the use of the MARISAT satellite presently located at 176.5 degrees East Longitude in the POR will necessitate that Comsat provide service through the Comsat General antenna used for telemetry, tracking and command (TT&C) service for the MARISAT POR satellite from its coast earth station at Santa Paula, California. [3] This facility will be modified to include communications capacity needed on behalf of AFRTS, Comsat states. The AFRTS service, Comsat explained, will entail up to two simultaneous audio programs using the voice group broadcast capability of the INMARSAT system to the ship locations receiving the broadcast. The AFRTS signal for the POR will be transmitted by AFRTS through the RCA SATCOM F2R domestic satellite to a receive-only Domsat terminal located at the Santa Paula coast earth station. Comsat states that service is requested to begin November 1, 1988.

4. The application filed by Comsat General is to modify its Santa Paula earth station antenna (KB-34) number one (Santa Paula Antenna No. 1) Radio Station License to enable it to provide communications services in addition to the TT&C services currently authorized. The authorization sought is necessary to provide uplink facilities from Santa Paula on a contract basis to Comsat for operation with the MARISAT POR satellite. To provide this service, Comsat General states it will receive a Program Audio channel from AFRTS using a receive-only earth station at Santa Paula. It will then transmit the AFRTS signal via its Santa Paula Antenna No. 1 as modified for communications purposes. Comsat General explains the AFRTS signal transmitted from Santa Paula will be received by government-furnished ship earth station(s) in the POR and transmitted to American servicemen and their dependents.

5. According to Comsat General, relatively minor changes to its Santa Paula Antenna No. 1 will be needed to provide simultaneous TT&C and communications services. These changes chiefly consist of modifications to the waveguide switching plate and the addition of related equipment, including a C-Band upconverter and a frequency synthesizer.[4] Comsat General requests the Commission to delete or modify General Provision D of the Santa Paula Antenna No. 1 License which currently requires the antenna to be used solely for COMSTAR and MARISAT TT&C purposes; and change Item 4(a) of the license, which describes the antenna as "TT&C Antenna No. 1". Comsat General notes that in keeping with current practice, the emission designators on their license should read: Emission 34MOFXN denotes maximum value used for monitoring service, Emission 800KFXD is used for telecommand and pilot purposes and Emission 24KOF3E is used for provision of AFRTS audio program channel services.

6. Comsat indicates that the total cost for the POR service, including capital equipment costs of approximately150,000, is492,571 over the five-year life of the contract,[5] and that accounting will be performed in accordance with Comsat's established accounting procedures.

DISCUSSION

7. Upon review of the applications, we find Comsat's plan to provide communications services and Comsat General's plan to modify its TT&C capabilities at its Santa Paula Antenna No. 1 earth station are operationally sound approaches for meeting the needs of the AFRTS network. The proposed modifications will not adversely affect the environment; the antenna will continue to comply with all applicable rules. Comsat states its application will not extend satellite communications service into territory that, at present, is not directly served by the INMARSAT/MARISAT system and no new space segment facilities are required. Comsat and Comsat General state the instant applications are based on a specific request for service by a branch of the United States Government.

8. We therefore conclude that it is in the public interest to allow Comsat and Comsat General to offer this service to the Defense Communications Agency, Defense Commercial Communications Office. This service will allow transmission of AFRTS programs 24 hours per day and will replace an existing HF transmission by AFRTS over Voice of America facilities. The applicants' service will replace existing facilities which are inadequate to serve the customer without the addition of special equipment.

9. Accordingly, IT IS ORDERED that (a) the application of Communications Satellite Corporation, File No. I-T-C-88-163, IS GRANTED pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. 214 and Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. 753(c) to provide communications services, via the MARISAT POR satellite at 176.5 degrees East Longitude, for the Armed Forces Radio and Television Services network in the POR; and (b) the application of Comsat General Corporation, File No. CSG-88-086-ML, IS GRANTED pursuant to Title III of the Communications Act of 1934, as amended, to modify its Santa Paula Antenna No. 1 to provide AFRTS communications services, via the MARISAT POR satellite at 176.5 degrees East Longitude, in addition to the already licensed TT&C services.

10. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

11. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] The applications were filed under Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. Sec. 753(c), and Title II and III of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 214 and 301-399(b) (1987).

[2] Communications Satellite Corporation, 1 FCC Rcd 247 (1986).

[3] According to the applicants, Comsat General will be providing service to Coms on an arm's length contract basis.

[4] Comsat General notes further that its Santa Paula Antenna No. 1 is currently licensed for backup purposes for Comsat World Systems Division's co-located TT&C and communications earth station KA-31. According to Comsat General, there is no need for further frequency coordination, as the technical characteristics of the AFRTS signal will be identical to transmissions now being provided by the co-located KA-31 communicationsantenna.

[5] Comsat has stated it will shortly file a rate covering the subject radio program service as part of its FCC Tariff No. 102.